

**THE PARTY OF THE FIRST PART:
A REVIEW OF MONTANA'S STATE CONTRACTING LAWS AND PROCEDURES**

Prepared on Behalf of the
**State Administration, Public Retirement Systems, and Veterans' Affairs
Interim Committee**

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BACKGROUND AND INTRODUCTION

Introduction to State Procurement and Contracting

The subject of public/private contracting has received considerable and increased attention, both in academia and the media. Buzz words such as "privatization" and "outsourcing" have become part of the public sector lexicon, particularly since the Reagan Administration. Increasingly, news reports and press releases detail the latest efforts to provide government services through private sector vendors. Predictions are that the trend of public contracts with private vendors will continue and that public/private contracts will most likely increase in breadth, depth, monetary value, and public visibility.

As with many things, Montana is typically a microcosm of national trends and events. That can certainly be said with public procurement and contracts. The relatively recent yet consistent trend toward outsourcing many historically in-house or directly-provided public services is evident in regard to state procurement, particularly procurements involving services.¹ What not long ago were common in-house, directly provided services -- mental health care, prisons, software engineering, janitorial, grounds maintenance -- are now largely outsourced through numerous and varied public/private contracts. Some of the contracts have been high value, highly visible, or moderately contentious or a combination.

In 1999, Senate Joint Resolution No. 9 (SJR 9) was introduced and adopted partially because of the scope, nature, and visibility of several recent state/private contracts. Although willing to participate in extended

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In 1998, the Office of the Legislative Auditor estimated that the state contracted for about \$380 million worth of supplies and services annually. See *Contract Monitoring: A Limited Scope Review* (98SP-45), Office of the Legislative Auditor, State Capitol, Helena, MT, 1998, p.1.

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public/private contracts, even to the point of being an advocate for increased outsourcing in some cases, the Montana Legislature in January 1999 was confronted with several instances where the public/private relationships were stretched thin, some even failing. Accompanying the practical difficulties of providing the services at all was the added complexity of constructing, managing, and enforcing the terms of agreements. Further, the media was poised for continued scrutiny of service delivery under the contracts and interested clients, citizens, and many legislators were tense, doubtful, even dismayed.

It was under those conditions that SJR 9 passed the Senate 48-0 and the House of Representatives 86-12. On May 17, 1999, the Legislative Council assigned the SJR 9 study to the State Administration, Public Employee Retirement, and Veterans' Issues Interim Committee (SAIC or Committee).

The Nature and Scope of Senate Joint Resolution No. 9

The circumstances surrounding and resulting from the contracts alluded to previously had led the 56th Legislature to adopt SJR 9. (The full text of SJR 9 may be found in Appendix A.) The preamble language contained in SJR 9 describes in greater detail the Legislature's initial concerns:

WHEREAS, a national trend toward privatization of government services has led many states to closely examine and refine their contracting laws and procedures; and

WHEREAS, the State of Montana is relying to an ever-greater degree on numerous types of services provided through contracts with private sector vendors; and

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WHEREAS, the Department of Administration and other entities have indicated that there is a large body of new information deriving from other states' contract development and administration experiences that may be of great value to the Legislature and the State of Montana; and

WHEREAS, Montana's large-scale contracts with private sector vendors include a diverse range of services, such as prisons, managed care, and information technology; and

WHEREAS, the success or failure of government programs provided by private sector vendors hinges on the ability of the state to effectively develop, negotiate, and enforce contracts with the private sector; and

WHEREAS, risks to state resources are inherent in the contracting process; and

WHEREAS, both the Joint Oversight Committee on State Management Systems and the Legislative Finance Committee have expressed concerns about an absence of adequate protection of the state's interests throughout the contracting process; and

WHEREAS, it is a responsibility of the Legislature to examine whether adequate, consistent policies and procedures are in place to ensure that appropriate contracting practices are in use. (Senate Joint Resolution No. 9, L. 1999.)

As outlined in SJR 9, the goals of the study of state contracting were to include:

(2)...(a) a thorough review of current law governing contracting, procurement, and contract enforcement;

(b) a thorough review of current state agency contracting, procurement, and enforcement procedures;

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(c) an examination of how other states have addressed increases in the scale and scope of contracts with private sector vendors, including other states' experiences with centralizing state procurement, contracting, and contract enforcement responsibilities in special review boards, commissions, and councils;

(d) a review of recent Montana experiences with contracting for services and contract enforcement, paying particular attention to large-scale contracts and the lessons learned from the experiences;

(e) an examination of the possibilities for providing agencywide consistency in the contracting process and enhancing protection of the state's interests in contract negotiation and enforcement; and

(f) an examination of the current level of review and technical support provided during the development of a contract. (Senate Joint Resolution No. 9, L. 1999.)

Chapters 1 through 7 of this report respond to the items commissioned in the study. Prior to addressing those items, however, it will be useful to have some additional background.

Review of the 1999-2000 Interim: Committee Activities

The SAIC met eight separate times to discuss the SJR 9 study of state contracting -- in June, September, and November 1999 and in January, February, March, May and June 2000. In general terms, each meeting included some level of review of prior meetings' discussions, actions, directions, and so on, as well as opportunities for interested persons, including state agency staffers and the public, to address the Committee. Additionally, the SAIC members regularly discussed the issues on the

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agenda, including question and answer sessions between the members and between the SAIC members, staff, and audience participants.

Committee's Approach

The study approach taken by the SAIC closely followed the outline suggested in SJR 9 and was characterized thus is the staff-prepared, committee-adopted study plan:

Study Approach: The study can be conducted through a series of staff reports and analyses, combined with subsequent committee discussion of policy issues and options. Staff reports and analysis should include: (1) current law; (2) agencies' processes, including review and technical support; (3) other states' experiences and processes; and (4) identifying policy options. Committee involvement should include: (1) exploring Montana's experiences with large-scale contracts for services; and (2) discussing policy options, including recommendations for policy change. Front-load with staff research and reporting; back-load with committee discussion/action. Staff reports to committee by May 2000; committee "hearings" in May/June 2000; committee discussion/action in August/September 2000.²

- c Objective: Review current law governing contracting, procurement, and contract enforcement, including state agency contracting, procurement, and enforcement procedures.

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Preliminary Evaluation of SJR 9: State Contracting by Dave Bohyer, Research Director, Montana Legislative Services Division, September 1999.

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- Action: Supplemental to the general outline of Committee activities described previously, Chapters 1 and 2 provide a discussion of Montana law and administrative procedures. The draft legislation in Senate Bill No. 90 (see Appendix C) contains the Committee's recommendations for "housekeeping" and policy changes.
- 0 Objective: Examine how other states have addressed increases in the scale and scope of contracts with private sector vendors, including other states' experiences with centralizing state procurement, contracting, and contract enforcement responsibilities in special review boards, commissions, and councils.
- Action: The Committee reviewed numerous articles and excerpts addressing other states' procurement processes generally or, in some cases, with respect to individual states. The SAIC members also participated in a seminar on procurement (public contract) law and process in Massachusetts and Oregon, led by chief procurement officers from each of the respective states. A more complete description is contained in Chapter 6.
- 0 Objective: Review recent Montana experiences with contracting for services and contract enforcement, paying particular attention to large-scale contracts and the lessons learned from the experiences

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- Action: The Committee heard testimony from Executive Branch and Legislative Branch staff on a variety of contracts, including the recent MT PRRIME/SABHRS (legacy management systems) and POINTS (revenue systems) initiatives. A more detailed discussion of the testimony, findings, and conclusions is contained in Chapter 5.
- C Objective: Examine the possibilities for providing agencywide consistency in the contracting process and enhancing protection of the state's interests in contract negotiation and enforcement
- Action: The Committee focused primarily on contracting processes within the Department of Administration, although some attention was given to contracting processes elsewhere, including the Department of Transportation, the Department of Corrections, and the Department of Public Health and Human Services. At the most basic level, each agency generally follows the statutory law applicable to it, as well as applicable administrative rules. Administrative processes may vary from agency to agency and even within an agency. Such variations may be due to the nature and scope of the procurement from which a contract results. More information on contracting consistency is provided in Chapter 3.
- C Objective: Examine the current level of review and technical support provided during the development of a contract.

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Action: Similar to the topic of consistency, the SAIC focused on the Department of Administration, although considerable testimony and information was also provided by the Department of Transportation. In short, the levels of review and technical support vary, both among and within agencies. The variations are somewhat due to differences in the nature and scope of procurements and contracts, but are also partially due to the differing capacities of the agencies, e.g., number of available staff, fiscal flexibility, in-house expertise and access, etc. Further exploration of these matters is offered in Chapter 4.

CHAPTER 1: MONTANA LAW GOVERNING CONTRACTING, PROCUREMENT, AND CONTRACT ENFORCEMENT

Montana Statute

Montana's current law governing state contracts in general³ is contained in Title 18 of the Montana Code Annotated (MCA), especially in Chapter 4, the Montana Procurement Act (Act). Adopted in 1983 by the 48th Montana Legislature, the Act was based on model legislation that now serves as the basis for public contracting law in many states. Individual provisions of the Act have been amended at various times, and the Act was generally revised in 1997.⁴

A casual examination of the Act reveals the framework of state contracting law. Part 1 of the Act provides for general provisions, including: purpose; definitions; public access; and exemptions.

Part 2 frames the duties of the Department of Administration (DOA) with respect to contracting, including: authority of the DOA; delegation of authority; requirements and restrictions regarding specifications; and remedies for state violation of certain provisions.

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Statutory provisions for construction contracts are found in Title 18, chapter 2, MCA, and for architecture, engineering, and land surveying services in Title 18, chapter 8, MCA. Highway construction contracting is covered in Title 60, chapter 2, MCA.

⁴ See Chapter 443, L. 1997.

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Procurement procedures are the focus of Part 3 of the Act. These 14 sections provide: definitions; source selection methods; sealed bidding and proposals; small purchases and sole sources; contract security; and a range of other administrative guidelines.

Part 4 of the Act addresses cooperative purchasing, including: authorization; shared supplies or services; joint uses; and so on.

Thus, Title 18, chapter 4, MCA, in conjunction with chapter 1 of Title 18, provides the statutory basis for the bulk of general state procurements.

Administrative Rules

In addition to the statutory provisions, however, are the administrative rules that implement them. Found in Title 2, Chapter 5, Administrative Rules of Montana (ARM), the rules expand on the statutory provisions of the MCA. In seven sub-chapters⁵, the rules cover: the regulation of procurement activities (Sub-Chapter 2); procedures for using agencies (Sub-Chapter 3); procedures for vendors (Sub-Chapter 4); general bid provisions (Sub-Chapter 5); types of bids (Sub-Chapter 6); and surplus property (Sub-Chapters 7 and 8). All told, the administrative rules, as measured in pages or words, provide about double the guidance provided by the Montana Procurement Act. An expanded discussion of the rules is provided in Chapter 2 of this report.

⁵ All but one of the provisions of Title 2, chapter 5, sub-chapter 1, ARM, have been repealed.

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Case Law

The final piece of the legal puzzle is case law.⁶ The Annotations to the Montana Code Annotated for Title 18, chapters 1 and 4, MCA, provide some guidance regarding court decisions on public procurement. More important, however, is the general body of case law applicable to contracts between private parties. That body of law is contained in Title 28, MCA, and the derivations from that law.

One particular Montana Supreme Court decision of recent vintage that has had considerable repercussions is *Great Falls Tribune Co., Ind., v. Day*, (1998 MT 133,289 M 155). The following delineation is taken from the annotations to 18-4-304, MCA.

Economic Advantage Inadequate Reason for Denial of Public Right to Observe Government Deliberations in Corrections Vendor Process: A newspaper company sought to restrain the Department of Corrections from excluding the public from meetings of the committee that reviewed proposals for operating private prison facilities. The District Court held that the public had no right to observe the negotiation phase of the committee's work, but that once negotiations were completed, the process by which the conclusions were arrived at must be open to public observation. Both parties appealed. The Supreme Court noted that as part of an Executive Branch agency, the Department and the committee were considered governmental bodies pursuant to 2-15-104 for purposes of procurement and that under the constitutional

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A legitimate claim may be made that opinions of the Attorney General carry the same weight as statute or case law. For convenience, AG opinions have been recognized as having the same effect and implications as court cases.

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right to know, proposals submitted by private vendors were considered documents of a public body or agency that, under 2-6-102, the public has a right to inspect. Under the two-part test in *Missoulain v. Bd. of Regents*, 207 M 513, 675 P2d 962 (1984), the only exception to the constitutional provision arises when the demand of individual privacy clearly exceeds the merits of public disclosure. The state contended that the meetings at issue were closed for economic advantage, but economic advantage is neither a privacy interest nor a sufficient reason for denying the public the opportunity to observe deliberations of public bodies or to examine public documents, including proposals submitted to the public body by a vendor, unless the proposal concerns a privacy interest involving legitimate trade secrets or individual safety. A public agency's desire for privacy does not provide an exception to the public's constitutional right to observe its government at work. To the extent that provisions in ARM 2.5.602 or this section require exclusion of the public from the competitive bid process, those provisions are unconstitutional and unenforceable. *Great Falls Tribune Co., Inc. v. Day*, 1998 MT 133, 289 M 155, 959 P2d 508, 55 St. Rep. 524 (1998), following *Mtn. States Tel. & Tel. Co. v. Dept. of Public Service Regulation*, 194 M 277, 634 P2d 181 (1981), *State ex rel. Great Falls Tribune Co., Inc. v. District Court*, 238 M 310, 777 P2d 345 (1989), *Great Falls Tribune Co., Inc. v. Great Falls Pub. Schools*, 255 M 125, 841 P2d 502 (1992), and *Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices*, 263 M 324, 868 P2d 604 (1994).

As a result of the *Tribune* case, the 56th Legislature (1999) passed Senate Bill No. 82 (Ch. 416, L. 1999), which generally revised the public's right to examine proceedings and documents in the context of public

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contracts. In part, SB 82 revised 18-4-304(4), by replacing the previous language, i.e., the language found to be unconstitutional in *Tribune*, with the following:

(4) After the proposals have been opened at the time and place designated in the request for proposals, proposal documents may be inspected by the public, subject to the limitations of:

- (a) the Uniform Trade Secrets Act, Title 30, chapter 14, part 4;
- (b) matters involving individual safety as determined by the department;
- (c) information requested by the department to establish vendor responsibility unless prior written consent has been given by the vendor, pursuant to 18-4-308; and
- (d) other constitutional protections.

Senate Bill No. 82 also repealed previous language that had appeared in 18-4-304(6), MCA, which read:

(6) In conducting discussion, there may not be disclosure of any information derived from proposals submitted by competing offerors.

The elimination of subsection (6) of 18-4-304, MCA, has probably had the more significant impacts. Where, prior to the enactment of SB 82, the state was able to withhold disclosure of information and material submitted as part of a request for proposals, such information is now generally available at the time the state gains possession of the information. The

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change, based on the public's constitutional right to know under the *Tribune* case, now potentially allows competing vendors to have the advantage of knowing other vendors' proposals *prior to* all proposals being finally submitted.

Summary

Montana is a "model act" state, along with about two-thirds of the other states. The Montana Procurement Act, codified at Title 18, chapter 4, MCA, provides the basic provisions of state procurement law. The Act is implemented largely through administrative rules, codified at Title 2, chapter 5, ARM. In addition, the law applicable to contracts generally, Title 28, MCA, also applies.

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The Act has served its purpose reasonably well since its adoption in 1983. With periodic revisions, including the major revisions in 1997, the Act has remained relatively current with changing procurement practices and trends in both the public and private sectors. Future revision may be advisable to ensure that Montana procurement law keeps pace with the changing environment that is the delivery of public services.

Administrative Procedures of Procurement and Contracting

The statutory authority to administer state contracting laws is provided in Title 18, chapter 4, part 2, MCA. In general terms, Title 18, chapter 4, MCA, is the legal foundation for public contracting and procurement. The procedures used by the state are embodied in administrative rules, which must be promulgated according to the Administrative Procedure Act. As mentioned in Chapter 1 of this report, the administrative rules for state contracting and procurement are found in Title 2, chapter 5, ARM.

Title 2, chapter 5, ARM, provides the details--form, substance, process, etc.--for agencies to follow whenever a procurement is undertaken. The rules provide considerable guidance with respect to procurement processes, e.g., requests for proposals or small purchases. However, the rules are nearly silent with respect to enforcement procedures, providing only general guidance in 2.5.303, ARM:

(1) Except for items purchased and warehoused by the division's central stores program, agencies are responsible for receiving supplies and services procured on their behalf by the department. Receiving means inspecting the

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supply or service and checking it against the contract to insure that it is acceptable, complete and in compliance with the terms of the contract.

(2) Agencies should submit complaints about vendor performance to the division. The division will investigate complaints and attempt to resolve the problem to the agency's satisfaction. The division will notify the complaining agency of any action taken as a result of the complaint.

(3) The state of Montana reserves the right to assess liquidated damages for failing to comply with delivery requirements indicated in the bid proposal. This sum may be deducted from vendor payment for failure to deliver when specified. Liquidated damages should not be punitive and should only be used where it is difficult to determine actual damages at the time of contracting. No premium will be awarded to the vendor for delivery in advance of the specified time.

The rule is reasonably clear that the contracting agency is the entity responsible for monitoring and enforcing a contract within which the agency is recognized as the purchaser. From a variety of sources, the Committee was informed that resources to monitor and enforce contracts varies from agency to agency and even within a single agency.⁷ For example, as reported by the Office of the Legislative Auditor,

... Contract monitoring varies substantially among agencies. Contract monitoring may be one of several duties performed by agency staff. Or, an agency may dedicate staff solely to contract monitoring. The extent and

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See the *Minutes* of the SAIC for the meetings held in Jan., Feb., and March 2000. See also *Contract Monitoring: A Limited Scope Review*, Office of the Legislative Auditor, State Capitol, Helena, MT, January 1998. (Ref. 98SP-45). Within this audit report are references to other audits that had been conducted or were contemplated. (See p. 17 of *Contract Monitoring*.) The audits referred to further attest to the variances among and within state agencies.

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scope of contract monitoring can vary substantially, depending on the size, complexity, and costs for contracted services. The effectiveness of contract monitoring activities depends substantially upon an agency's experience and expertise in contract monitoring.⁸

Capacity to Administer, Monitor, and Enforce

Other factors also bear on the effectiveness of contract administration, monitoring, and enforcement, not the least of which is an agency's capacity for conducting these activities. An agency's capacity may be assessed by examining the resources available for contract-related tasks, including:

- Ⓒ the numbers and availability of personnel involved in contract processes;
- Ⓒ the knowledge, skills, and abilities of the personnel;
- Ⓒ continuing education and training opportunities for the personnel; and
- Ⓒ other resources, primarily funding, available for effectively monitoring contracts.

There is a fundamental relationship between the contract itself and the effectiveness with which the contract can be monitored and enforced. For example, if the contract is well written, spelling out the terms, conditions, inputs, outputs, outcomes, and other, objective criteria by which the contractor-vendor's performance can be measured, the likelihood of success is enhanced although not guaranteed. Conversely, a poorly written contract is more likely to be difficult to monitor and enforce, but does not, by itself, predict failure.

⁸ *Contract Monitoring: A Limited Scope Review*, p. 17.

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The literature on contracting points out the need for procurement staff, contract administrators, and legal experts who are well trained and experienced if a contract program is to be highly successful.⁹ Also inherent in the commentary is the need for regular, clear communication between all of the purchaser's representatives involved.¹⁰

Closer to home, a review by Legislative Audit Division (LAD) staff of contract work done by state agencies between 1993 and 2000 revealed that concerns have existed and continue. After reviewing more than 160 audit reports, LAD staff noted some 140 audit recommendations had been made. Under the general heading of "Monitoring and Oversight" recommendations, auditors made the following observations:

... LAD found the overall oversight and evaluation of most of the contracts was weak. Audit work found examples where agencies did not define contract staff's oversight responsibilities and there were limited policies and procedures. Staff were unclear of their responsibilities resulting in less than adequate awareness of the contractor's effort in providing the required services.

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See John A. O'Looney, *Outsourcing State and Local Government Services: Decision-Making Strategies and Management Methods*, Quorum Books, Westport, CT, 1998. See also Donald F. Kettl, *Sharing Power: Public Governance and Private Markets*, Brookings, Washington, DC, 1993. See also, e.g., United States General Accounting Office (GAO), *Federal Acquisitions: Trends Reforms, and Challenges*, testimony of Henry L. Hinton, Jr., March 16, 2000, (Ref: GAO/T-OCG-00-7), pp. 14-15.

¹⁰

For example, the attorney who drafts a contract between a state agency and a vendor must have at least working knowledge of the subject of the contract, e.g., the project to be designed, the care to be provided, the products to be developed, built, and delivered. At the same time, the program manager, who also typically serves as the contract administrator, must be able to adequately articulate program needs and expectations (inputs, outputs, outcomes, other deliverables, time lines, etc.) so that the procurement staff can solicit the desired supply or service (through bid specifications, RFP descriptions, etc.) and the supporting attorney can ensure delivery through appropriate and enforceable contract language. Several iterations of draft documents may be necessary at each stage of the procurement and contracting process.

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Recommendations also included the need to improve the monitoring of sub-contracts.¹¹

In conducting its inquiry under SJR 9, the Committee was informed that the capacity to effectively carry out programs through contracting varies by agency and sometimes within an agency, particularly the larger, more diverse departments. The central stores program in the DOA and the engineering, construction, and maintenance programs at the Department of Transportation, among others, reportedly have a high capacity for successfully contracting with private vendors.¹² The reported difficulties with the Montana Project to Reengineer the Revenue and Information Management Environment (MT PRRIME) as undertaken by the Information Services Division in the DOA or the mental health managed care contract entered into by the Department of Public Health and Human Services (in 1997), among others, suggest a different capacity for managing a contracting program successfully.¹³

¹¹

Memorandum from Susan Jensen to Jim Pellegrini, Office of the Legislative Auditor, Feb. 8, 2000, re Contract Services Recommendations.

¹²

See testimony of Shery Motl, Marvin Eicholtz, Diane Tordale, Steve Garrison, and John Blacker in *Minutes*, SAIC, meetings of Jan., Feb., and March 2000. See also, *Consultant Design Projects: Department of Transportation*, Performance Audit Division, Office of the Legislative Auditor, Helena, MT, December 1996.

¹³

Unquestionably, the nature of the contracts referred to in the central stores program or the Department of Transportation are more routine, contextually, than are either the MT PRRIME contracts or the DPHHS contracts for mental health managed care. Nonetheless, comparative observations and reports on the results of the contracts imply greater capacity in some agencies/divisions than in others.

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Contract Enforcement

Finally is the subject of contract enforcement.¹⁴ Information on enforcement actions taken by the state is not kept centrally, if at all.¹⁵ Moreover, primary or secondary efforts by an agency to resolve problems or concerns prior to an enforcement action are likely to be as effective or more so than a formal enforcement action. Thus, a threat of "enforcement" by an agency may preclude subsequent, more formal action, yet still result in a desired outcome. It is at this juncture that the line between "monitoring" and "enforcement" becomes blurred.

Unfortunately, the lack of information on enforcement actions precludes analysis of the actions. For example, the following questions become difficult to answer:

- o Do enforcement actions typically have the desired outcome or result, i.e., are the state's interests protected and advanced?
- o What resources--time, money, staff or other expertise--are committed to enforcing contracts?
- o Have the outcomes of contract enforcement actions justified the amounts of resources committed to the actions?
- o Have successful enforcement actions resulted in more effective procurements, contract administration, and purchaser/vendor relationships?

¹⁴

As used here, "contract enforcement" means a formal action taken by the state that, ultimately, may: (1) compel a contractor to perform in specified manner; (2) preclude a contractor from performing in a specified manner; or (3) have a negative result financially to the contractor.

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Various interviews by SAIC staff with: Beth Baker, Chief Deputy AG, Montana Department of Justice; Larry Fasbender, Chief of Staff, Montana Department of Justice; Steve Garrison, Staff Attorney, Montana Dept. of Transportation; Dal Smilie, Chief Legal Counsel, Montana Department of Administration.

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C What, if anything, might a lack of successful enforcement actions suggest?¹⁶

Summary

Although procurement procedures for routine purchases are relatively standard among state agencies, more-complex contracting and enforcement procedures vary. The variations may be due to differences in the supplies or services being purchased, or to other factors.

There is a lack of readily available information on enforcement actions, including the expenditure/investment of time, money, or other state resources. The results of enforcement actions are similarly difficult to assess. That difficulty may be due, in part, to the blurring of lines between "monitoring" and "enforcing" a contract. More information and analysis may be advisable to protect the state's interests.

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From a positive perspective, a lack of enforcement actions might indicate extremely well-run contracting programs. Conversely, a lack of actions might indicate a concomitant lack of will, fortitude, resources, capacity, etc., on the part of the state, in which case the state's interests might not be protected or advanced.

CHAPTER 3 -- PROVIDING CONSISTENCY AND ENHANCING PROTECTION OF THE STATE'S INTERESTS IN CONTRACT NEGOTIATION AND ENFORCEMENT

Consistency in Processes

The Committee was informed that, pursuant to 18-4-222, MCA, the DOA has delegated procurement authority to every department in Montana state government, which delegations include writing, monitoring, and enforcing contracts. As previously noted, testimony¹⁷ before the Committee revealed that contracting processes and procedures vary from agency to agency and even within individual agencies. In short, consistency is limited with respect to contract negotiation and enforcement.

Whether or not consistency is achievable or even advisable is a matter that was discussed only in passing by the Committee. At first blush, consistency would seem to be logical.¹⁸ However, "things exist for a reason" is a maxim that is frequently proved to be true. For example, the processes used to negotiate and enforce a contract for the purchase of commodities, e.g., copy paper, computers, or vehicles, may need to be different from the processes employed to negotiate and enforce a contract for the purchase of services (in general). Additionally, procedural differences may make sense in negotiating and enforcing contracts for incarcerating felons, providing mental health care to indigent citizens, or designing, implementing and maintaining legacy management systems for the efficient operation of state government.

¹⁷

See *Minutes of the SAIC*, January, February, and March 2000 meetings, Legislative Services Division, Helena, Montana.

¹⁸

As noted by Ralph Waldo Emerson, however, "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do... Speak what you think today in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today." Quoted in *Bartlett's Familiar Quotations*, from *The American Scholar*, 1837.

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To the extent that the maxim is true, differences in processes probably exist for reasons that may be as legitimate today as they ever were. Establishing what those reasons are or may have been originally may be difficult at this point, but agencies could be well advised to examine or re-examine the rationale for their respective ways of doing business to ensure that the norm--whatever that is--and exceptions to it continue to be justified.

Central Procurement and Contract Staff

On a closely related matter, SAIC staff initiated discussions with Department of Justice (DOJ) staff and others on the possibility and advisability of having a central staff of contract law experts/practitioners that state agencies could rely upon to develop or review contract language, ensure that agencies follow at least minimal procedural guidelines, craft or adapt boilerplate language, and consult with and represent agency personnel on contracting matters to increase the soundness of state contracting practices. Further, in the event a state agency must resort to some type of enforcement action, the cadre of contract law experts would be available to act on the agency's behalf. In short, the concept would be to enhance or establish a central entity whose mission and function would be to protect and advance the state's best interests.

For a variety of reasons, the discussions withered before the issues could be examined more closely or, in some cases, even identified. Nevertheless, Committee members indicated an interest in investigating further the potential benefits and detractions of the concept. As a result,

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SAIC staff reinitiated discussions and DOJ staff, at least, remain willing to explore the concept of centralizing legal contract support.¹⁹

As these discussions develop, if they do, there are a number of issues to be considered regarding a centralized entity with contract law expertise, some of which are mentioned below.

- C What is the current level of legal contract support provided throughout Montana state government in terms of the number of FTE dedicated to contract matters? Legal professionals' time invested on up-front work, e.g., drafting contract language or reviewing request for proposals (RFP) material, on contract monitoring, and on contract enforcement should be accounted for separately to accurately assess the demands of state agencies. Data categorized by department, division, or other work unit might also be enlightening.
- C What is the (estimated) cost of the current level of contract support?
- C Is legal contract support readily available within all departments (or other work units) and is the availability relatively consistent among departments and within work units of individual departments? If not, why?
- C Does the current level of legal contract support adequately meet the need or demand for this type of support?
- C Would additional legal contract support make state contracting programs better, i.e., would the state's interests be better protected and enhanced? What might be the downside of providing additional staff?
- C If a need for additional legal contract support is identified, should the support be allocated to individual departments (or other work units)

¹⁹ Interviews with Larry Fasbender, Chief of Staff, Department of Justice, Sept.-Nov. 2000.

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that are most in need or should the support be provided universally and uniformly, for example, in a manner similar to telecommunications services or the state motor pool? What other models within Montana or in other states might be advisable?

- C If legal contract support is made available from a centralized entity, how would agencies' staffs gain access to the services? How would the centralized entity determine priorities among competing demands? How would claims of lack of access or other problems be addressed, procedurally?
- C Easy, direct, and immediate access to legal contract support presumably forecloses, stops, or at least minimizes the chances of legal errors that would have otherwise occurred (in the absence of the support) along the procurement continuum. What risks are there that legal contract support provided centrally rather than locally might expand occurrences of or exacerbate avoidable legal pitfalls?
- C Top-notch contract law expertise, particularly litigators, is relatively expensive. Mistakes in procurement and contracting can be expensive as well. Could the cost of expanded or enhanced legal contract expertise be justified?

To be sure, other issues will emerge as the discussion continues, if it does continue. As state policy makers, legislators will want to determine whether a problem exists, in fact. Subsequently, they will need to ask and have answered an array of questions aimed at exploring the issues from different viewpoints, particularly the viewpoints of current stakeholders. Indeed, things usually do exist for a reason; and it is well advised to periodically identify and assess the continuing validity of the reasons.

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Summary

The DOA is statutorily authorized to procure supplies and services for the state, by contract or otherwise. The Department is also authorized to delegate that authority to other state agencies, which it has done. The Department has retained some control over purchases, however, by adopting administrative rules that govern the form, substance, and procedure of state procurements and contracts.

Although consistency may be desirable in the context of public procurement, there are differences among and within agencies as to process and form. Those differences may be driven by variations in the procurements handled by different work units. For example, the purchase of commodities in one unit and the purchase of services in another. Nevertheless, agencies could benefit from examining the reasons that underpin their procurement processes to ensure that the ways things are done continues to promote the state's interests.

CHAPTER 4: REVIEW AND TECHNICAL SUPPORT PROVIDED DURING THE DEVELOPMENT OF A CONTRACT

Levels of Support

The level of review and technical support provided during contract development varies among state departments and even within departments. Testimony to the SAIC suggested that levels of review and technical support reflect patterns similar to those identified in Chapter 3 with respect to levels of legal support in contract monitoring and enforcement. As an example, referring again to information gleaned from performance audits of state agencies,

... Contract specifications recommendations address the importance of a clearly written contractual agreement to ensure the desired requirements are met, the contract applicant has the necessary qualifications, and helps guarantee the agency can recover damages in the event of poor performance. Recommendations addressed concerns with the developments of the terms, conditions and provisions of contracts.²⁰

The audit findings and continuing reports of problems associated with state contracts precipitate a number of questions, some of which are stated below.

- c Is adequate technical expertise available (to contract drafters) during the development of contract language? (The term "adequate" as used here implies readily available, knowledgeable, well-trained, articulate, responsive, and a host of other adjectives that, taken together, would describe overall capacity and competence.)

²⁰ Memorandum to Pellegrini, LAD, February 8, 2000.

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- C Is the technical expertise currently available effectively and efficiently employed during the development and review of contracts? If it is not available, then what are the underlying reasons for the lack of availability? If it is available, then what other factors might account for relevant problems with contracts?
- C If technical expertise is to be expanded or enhanced, does it make sense to attempt to centralize the expertise and make it readily available to any or all agencies?
- C If the contracting programs within some departments (or other work units) appear to be highly successful, particularly with respect to the contributions of technical experts in the development and review of contract language, to what can the success be attributed? How is technical expertise employed? Are there written procedures, cultural norms, personal working relationships, or other factors that are crucial to success?
- C Does it appear that the employment of technical expertise in contract development and review is cost effective?

Summary

As with contracting processes, levels of technical and legal support vary among and even within state agencies. The reasons for the differences are likely due to a variety of factors, not the least of which is different internal capacity.

If future examination of procurement and contracting practices occurs, such as through a performance audit, considerable attention might be given not only to a review of levels of technical and legal support *vis a vis* contracts, but to the underlying reasons that levels of support vary.

CHAPTER 5 -- MONTANA EXPERIENCES WITH CONTRACTING FOR SERVICES

Recent Experience

The introduction to this report alludes to the situation, in general terms, faced by the 56th Legislature with respect to large-scale contracts. Somewhat more specifically, there were at least two contracts that were frequently covered in news articles and elsewhere. These contracts involved two distinct projects: one to provide mental health care and services to Medicaid-eligible and other low-income Montanans and a second to replace the state's legacy management (computer) systems.

The Committee was aware of both situations, but did not examine either in detail. Instead, the SAIC focused more generally on procurement statutes (including contracting statutes), comparative processes in other states, administrative processes for executing procurements and contracts, current procurement issues (e.g., preferences, small business development, etc.) associated with legislative policy, and matters of state agency capacity, in terms of the numbers, qualifications, availability, and so forth, of technical and legal support staff.

Nevertheless, the Committee was mindful of both projects and, therefore, some of its work was relevant to the two contracts and their visibility, implications, and repercussions. For that reason, a brief discussion of the two projects is worthwhile.

Mental Health Care

Background

Until the mid-1990s, the state administered programs that provided access by Medicaid-eligible and certain other low-income Montanans to mental health care and services. The Department of Social and

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Rehabilitation Services, the Department of Corrections and Human Services, and Department of Family Services were responsible for the programs and managed them through, primarily, a traditional "fee for service" structure where eligible clients received services and the service providers were reimbursed by the agencies. A variety of factors had caused the costs of the programs to escalate rapidly and policy makers were anxious to identify ways to freeze or reduce costs and still provide necessary services.²¹ "Managed care" was the alternative that was initially identified and was sufficiently attractive to be sanctioned by both lawmakers and administrators.

Solicitation and the Request for Proposals

Initial efforts to provide mental health services through a managed care model had begun as early as 1993, but were formally sanctioned by the legislature in 1995. During the summer of 1996, program and legal staff of the DPHHS worked in concert with staff of the Purchasing and Procurement Division (Division) of the DOA to design and disseminate a Request for Proposals (RFP) soliciting services referred to as managed mental health care. As originally constructed, the RFP exceeded 100 pages, not including the initial 17 attachments.²² The objectives of the RFP were stated in the solicitation.

²¹

A major reorganization of several state agencies in 1995 resulted in the Department of Public Health and Human Services, among others. Subsequent to the reorganization, the DPHHS was assigned primary authority and responsibility for mental health programs.

²²

State of Montana, Request for Proposal, "MANAGED MENTAL HEALTH CARE", RFP No. 9709-K, Montana Department of Administration, Sam W. Mitchell Building, Helena, MT, 1996.

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This Request For Proposals (RFP) is intended to enable the State of Montana (State) to select a competent managed care organization (MCO) with experience in the management and provision of mental health care with which to contract to implement Montana's Mental Health Access Plan (MHAP). The MHAP is a program to furnish publicly-funded mental health services to medicaid-eligible and other lower income Montana citizens in a manner which will increase access to a flexible, consumer-centered array of high-quality, cost-effective mental health services through an integrated, risk-based system of managed care. The MCO will be required to provide all necessary mental health services to all eligible individual within parameters established by the State's approved Section 1915(b) Waiver Application, this RFP, and the resultant contract.

Potential Proposers must recognize that the MHAP represents a significantly different approach to providing mental health care from that seen under traditional Medicaid and other health insurance programs or even other managed care programs. Montana's Mental Health Access Plan, if administered by a competent and experience MCO which is dedicated to the program's success, will establish a comprehensive and coordinated system of care with integrates all public funding sources to provide treatment of a uniform quality and continuity that we believe will be unprecedented in the nation's public health system.²³

²³ Ibid., p.100-1.

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Notwithstanding the state's effort to solicit widely for proposals, only three vendors responded. The state followed its established processes for evaluating the proposals and awarded a contract in April 1997.

The Contract

The state's contracted arrangements for mental health managed care seemed problematic from the beginning.²⁴ After initially awarding the 5-year, \$400 million contract to CMG Health, Inc., the DPHHS was sued by one of the remaining two unsuccessful bidders, Merit Behavioral Care Corp. The state and Merit settled out of court.

Within a few months of the original contract award, CMG was purchased -- "acquired" in the Wall Street vernacular -- by Merit Behavioral, the very same entity that had sued the state and with which the state had settled. Then, a mere five months later, Merit Behavioral was acquired by the one remaining unsuccessful bidder, Magellan Health Services.

In short order, Magellan found itself in much the same position as the DPHHS had prior to the contract, i.e., rapidly increasing costs and insufficient funds to pay for them. Reports suggested that Magellan was losing about \$1 million per month, a far cry from the profitable model envisioned by managed care advocates or Magellan.²⁵

During the rounds of vendor musical chairs, state providers of mental health services and the recipients of those services consistently and vociferously raised concerns ranging from the nonprovision of services (to patients) to the nonpayment of bills submitted by service providers. After

²⁴

See "Problems With Managed Mental Health Program Hold Lesson For Other States, Reports Mental Health Weekly"; from PRNewswire, Feb. 15, 1999. Article originally in *Mental Health Weekly*, Feb. 1999.

²⁵ See *Governing*, "Mental Adjustment", vol. 13, no. 6, March 2000, p. 84.

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months of news reports, public testimony to legislative committees and others, and anecdotal evidence portraying a service delivery system in nearly total disarray, the contract between the state and the vendor was terminated, scarcely 2 years after being negotiated.

The mental health managed care contract, at \$400 million, was the highest valued and among the most complex contracts ever issued by the state. The relative value of the contract, in itself, does not appear to have been a fundamental problem. What the fundamental problems were may be ascertained only by closer scrutiny.

Legacy Management Systems

The Project

As envisioned, this was the Montana Project to Reengineer the Revenue and Management Information Environment (MT PRRIME). The initiative was to have reengineered the state's business practices and was to have included the replacement of the state's legacy computer systems that help manage a variety of state programs, e.g., budgeting, accounting, human resources (including payroll), property management, and revenue collection and distribution, among others.

The Solicitation

Review of the solicitation process suggests that considerable thought and effort, as well as expense, was invested in ensuring a rational process and successful outcome. Although the initial approach to the project identified the selection of "best of breed" as superior, a different avenue

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was chosen.²⁶ After working with a private consultant, Deloitte and Touche, LLP. on a process to select a vendor, the state chose a Y2K-compliant software package that was touted essentially as a turn key system.²⁷

The Contract and the Product

The state also selected and contracted with a second consultant, Andersen Consulting, LLP, to assist a pool of state employees in adapting and tailoring the software package to meet Montana's needs. After more than a year's effort, numerous change orders, revisions to the "deliverables" initially thought to be integral to the systems, and the expenditure of ± \$19 million, the "product" was rolled out in phases during the FY 1998-99 biennium.²⁸

Although minimally functional when delivered, the State Accounting, Budgeting, and Human Resources System (SABHRS, pronounced like "sabres", as in the sword) was somewhat less than what was promised or

²⁶

SAIC staff discussions with DOA staff, Terry W. Johnson, Principal Fiscal Analyst, Legislative Fiscal Division, and Robert B. Person, Executive Director, Legislative Services Division. As used here, "best of breed" means, for example, the best word processing software, e.g., Word Perfect or Microsoft Word, the best spreadsheet software, e.g. LOTUS 123 or Microsoft Excel, the best database software, e.g., Oracle, and so on. Notably, different users will identify different packages as "better" than a competitor or even as "best of breed".

²⁷ The software package selected was PeopleSoft.

²⁸

Ch. 447, L. 1997 (House Bill No. 188) appropriated \$19.8 million to the DOA specifically for MT PRRIME. The DOA contended that it was that amount only that was appropriated for MT PRRIME. However, the same legislation appropriated \$14 million to the Department of Revenue for a projected loosely identified as "Integrated Revenue and Tax Systems". Other appropriations in Ch. 447 brought the total appropriated to nearly \$43 million for the FY 1998-99 biennium for IT projects. Subsequently, the 56th Legislature (1999) appropriated another \$18 million to the Department of Revenue for the META project, which was, at least in part, a continuation of the revenue projects begun the previous biennium. (See Ch. 519, L. 1999; HB 15).

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anticipated. Unlike the DPHHS experience with mental health managed care, however, there was no contract left to cancel or not renew after the several components of SABHRS were delivered. State agencies had and have no practical alternative to using the SABHRS system, even though data input was more costly and time consuming than promised (or when compared to the predecessor legacy systems, including SBAS, PAMS, MIBS, PPP, etc.²⁹).

Epilogue to State Management Systems

The state will have soon upgraded the PeopleSoft software on which SABHRS runs.³⁰ Such software upgrades are not unusual; however, in this case, the state is virtually compelled to purchase and implement the upgrade because PeopleSoft will no longer provide technical support for the prior version.

Whether or not implementation of SABHRS will ultimately show the cost-savings that were projected is not now known and is probably discernable only through further audits. Industry standards suggest that the

²⁹

SBAS stood for "State Budgeting and Accounting System"; PAMS stood for "Property Asset Management System"; MIBS stood for "Montana Integrated Budget System" and PPP stood for "Personnel, Payroll, Position Control System "

³⁰

The PeopleSoft "suite" purchased at the outset was to have included, ostensibly, several "modules" that were later omitted as deliverables. Reports from the DOA staff indicated that even though some of the modules were not to be delivered, neither the cost of the systems nor the time lines for delivery were reduced. From that information, SAIC staff and others inferred that the state may have paid more for less of a system than what was initially purchased and the smaller system purchased would not be delivered sooner than the larger system that was proposed. NOTE: The staff of the Office of the Legislative Auditor conducted an "information systems audit" on SABHRS during 2000 and reported its findings in December 2000. (See *Statewide Accounting, Budgeting and Human Resources (SABHRS) Audit* (OODP-02), Office of the Legislative Auditor, State Capitol, Helena, MT, November 2000.) Limited to "information systems", the audit identifies and discusses a variety of issues with SABHRS. The audit report was not available during the SAIC's activities in re SJR 9.

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types of transitions undertaken on the scope and nature of SABHRS cannot be accurately assessed until at least 5 years after implementation. Thus, an accurate and reliable assessment of the effects, financial and otherwise, of SABHRS probably cannot be known for at least another fiscal biennium or two.³¹

³¹ SAIC staff conversation with Tori Hunthausen, ISA Manager, Office of the Legislative Auditor, Helena, MT.

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Overview

When considering the question of how other states have addressed increases in the scale and scope of contracts with private sector vendors, the Committee invested considerable time, energy, and effort. Staff briefings introduced SAIC members to relevant topics ranging from the adoption and adaptation of the Model Procurement Act to intergovernmental comparisons of in-state bidding preferences. These items were mere appetizers for the information banquet served at a full-day seminar on the procurement and contracting programs that operate in Massachusetts and Oregon.

The Committee selected these two states³² to examine because of their respective notoriety with respect to the adoption of technology (Oregon) and with respect to structural and procedural reform (Massachusetts). A summary of the presentations is provided in the following pages. However, there is considerably more and more detailed information available in the SAIC files for the 1999-2000 interim.³³

Massachusetts

Massachusetts was one of the first states to have adopted the Model Procurement Act (MPA), in the early 1980s. The MPA was conceived by the National Conference of Commissioners on Uniform State Laws

³² Technically, Massachusetts refers to itself as a "commonwealth" rather than as a state.

³³

The SAIC files are repositied with the Montana Legislative Services Division, PO Box 201706, Room 110, State Capitol, Helena, MT, 59620-1706.

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(NCCUSL) and has been adopted by about two-thirds of the 50 states as the statutory basis for public procurements of services and supplies.³⁴

By the mid-1990s, the "Massachusetts Miracle" had come and gone, money was tight, and a new state administration had succeeded to power. The time was ripe for sweeping change in the process of procuring and contracting for supplies and services for state government programs. Recognizing the opportunity, if not the need, the staff of the state Operational Services Division (OSD) within the Executive Office for Administration and Finance (ANF)--comparable to Montana's Procurement and Printing Division within the DOA--set out to simplify, streamline, and enhance the procurement processes, including contracts, for the state. Ellen Bickelman, Deputy Procurement Officer, OSD, summarized the transformation for the Committee.³⁵

PROCUREMENT REFORM IN MASSACHUSETTS: HOW IS IT WORKING?

Presented by Ellen Bickelman, Deputy State Purchasing Agent
Commonwealth of Massachusetts
January 21, 2000

* * * * *

³⁴

Nearly every state that uses the MPA, including Montana, has adapted it to conform to state constitutional or other state legal requirements or to meet certain goals and objectives specific to the state.

³⁵

See *Minutes of the SAIC*, January 21, 2000, testimony of and material provided by Ellen Bickelman, Deputy Purchasing Officer, Operational Services Division, Commonwealth of Massachusetts.

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INTRODUCTION

Procurement Reform started with a work group involving members from over 25 state agencies whose vision was to create a system that would amount to a revolution in how the Commonwealth does its purchasing. The results were sweeping changes that would improve and streamline every aspect of the procurement process.

Procurement Reform has focused on continuous quality improvement and customer satisfaction to the extent that flexibility, streamlining, and "doing what makes sense" is now a daily and unremarkable occurrence. However, it had its origins in the following revolutionary changes in the procurement system infrastructure.

- **Regulations and Handbook:**

A unique collaborative effort of three oversight departments successfully collapsed five regulations totaling over 100 pages into one regulation of just 10 pages. This regulation was further revised in April 1997 to incorporate Purchase of Service (POS). This single regulation empowers departments to make their own decisions and allows for flexibility in the procurement process. Staff time and resources may now be allocated according to the size and complexity of the procurement.

This joint effort also produced a single *Procurement Policy and Procedures Handbook* to support customers. It was further revised in July 1998 to incorporate Purchase of Service, thus eliminating yet another separate handbook.

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- **Procurement Management Teams:**

The consolidation of 102 commodity classes into 17 procurement groups, each managed by a Procurement Management Team (PMT), brought a new, logical order to previous classification methods.

PMTs, led by Operational Services Division (OSD) managers, consist of approximately 360 staff from multiple departments as well as public officials from cities and towns. These team members are empowered to determine the entire course of the procurement cycle. They research existing contracts, evaluate needs, and meet with prospective bidders to develop Requests for Responses and Statewide Contracts that really work and which maximize the state's vast purchasing power.

- **Requests for Responses:**

The Request for Response (RFR) combines several former procurement methodologies. RFRs may be "built to suit" and/or "built to grow". RFRs incorporate the "Best Value" principles which serve as the practical and intellectual foundation of the procurement system. These principles have ended the "low bid" requirement which had shackled the previous procurement process.

- **Contracts:**

The consolidation of several different contract documents totaling over 70 pages into a one-page standard form, in conjunction with streamlined terms and conditions (which only needs to be filed once), has

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significantly improved the contracting process. Further revisions in April 1997 to incorporate Purchase of Service agreements, eliminated another 12 pages of boiler plate language.

Collapsing multiple contracts into one or a few broad contracts and reducing the number of separate procurements conducted by individual departments (thanks to the increased number of statewide contracts) has proven so beneficial that even nonExecutive departments are cashing in on the benefits of procurement reform. The result? Significant financial and administrative savings and a more convenient way of doing business without adversely affecting socio-economic programs.

- **Internet (Comm-PASS and all Procurement Information):**

Extensive use of the Internet for solicitations and all other procurement information has resulted in significant savings, increased competition (on a level playing field for small and minority and women-owned businesses) and lower contract prices. Information posted on the Internet is quickly and easily updated.

- **New Organizational Units:**

To support the new infrastructure, the Operational Services Division (OSD), the Office of the State Comptroller (CTR), and the Executive Office for Administration and Finance (ANF) collaborated to create three new units:

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Training, Marketing, and Outreach: Training has been offered on all aspects of the procurement system, including Comm-PASS (both an overview and the actual online posting of solicitations), transaction delegation, and comprehensive RFR education. Further, this unit is spreading the "good news" about procurement reform to cities and towns, small businesses, minority and women-owned businesses, and others.

Quality Assurance: The elimination of secondary approval processes and the delegation of certain transaction authorities represent a clear shift in discretion, responsibility, and accountability from the oversight agencies to departments. The Quality Assurance Unit, comprised of OSD and CTR staff, monitors departments to ensure compliance with the regulations and procedures.

Technical Support: This management information systems (MIS) unit assists users in Internet, Intranet, and Extranet applications.

- **OSD Administrative Savings, Retained Revenue, Cost Containment. and Funds Recovery:**

OSD has successfully managed continuous reductions in staffing levels coupled with increased functions and responsibilities.

OSD has increased retained revenues and is developing other opportunities for building revenue.

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OSD has successfully contained costs in the area of special education pricing and has vigorously assisted departments in recovering Commonwealth funds when necessary.

- **Continuous Quality Improvement and Customer Satisfaction:**

PMT experience has, among other things, produced valuable lessons in teamwork and the mechanics of consensus building. Both the many successes and the lessons learned have created a springboard from which exciting new initiatives can be launched. Examples include the Electronic Mall and the total integration of Purchase of Service with commodities.

To say that the SAIC members were intrigued with the reforms and procedures in Massachusetts would be an understatement. For the better part of an 8-hour seminar, the members and Ms. Bickelman³⁶ engaged in a constructive dialog about how things work in Massachusetts, the roles of the OSD staff, lessons learned, and a host of other matters. In no particular order of priority, the SAIC members seemed most interested in several areas.

Best Value Procurement

Long recognized in many arenas, "best value" contrasts with the traditional, tried-and-true "lowest bid" approach in several respects. First,

³⁶

The dialog included equal participation by Dugan Petty, Oregon's Chief Procurement Officer. Mr. Petty's observations and insights are summarized in subsequent pages.

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"lowest bid" means essentially that: lowest bid or lowest price offered. It typically does not include an analysis of life-cycle costs (such as reliability, maintenance, or other long-term costs), vendor reliability (based on past performance), adaptability to future conditions (as might be advisable with technology purchases, particularly software or services contracts), or other such factors. In short, if the vendor's product or service meets the minimal specifications of the bid or proposal request and the vendor submits the lowest price offered, then the bid must be awarded to the vendor.

In contrast, "best value" procurement takes into account factors well beyond the sole consideration of lowest price at the time of purchase. Purchase price continues to be a primary consideration, but the vendor's or product's reliability also may be considered, as may be such things as life cycle cost (including everything from maintenance and operating costs to salvage value), adaptability of the product or service to changing conditions that could affect the usability of the product or service, and other factors identified and measured or measurable that are intended to determine "value" as opposed to "cost".

The transition from "low bid" to "best value" required legislative intervention to amend Massachusetts law. If Montana were to embark on a parallel transition, statutes would also have to be revised.³⁷ The Committee recognized some potential benefits in the best value concept, but was cautious about instituting the concept without trying it first, particularly given the concerns expressed by certain stakeholders.³⁸ Consequently, the

³⁷

Various provisions of Title 18, chapters 1 through 4, MCA, would need attention, particularly 18-4-302 through 18-4-304, MCA. (See [LC0058], 57th Legislature.)

³⁸

See testimony of Mike Foster, Montana Contractors' Association in the *Minutes* of the SAIC, November 8-9, 1999.

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members sanctioned the idea of allowing "alternative procurement methods" to be tested on a trial basis, but only under certain statutory guidelines and, eventually, rules promulgated by the DOA. As proposed by the SAIC in SB 90³⁹, section 18-4-302, MCA, would allow for procurement alternatives.

Section 20. Section 18-4-302, MCA, is amended to read:

"18-4-302. Methods of source selection -- authorization for alternative procurement methods. (1) Unless otherwise authorized by law, all state contracts for supplies and services must be awarded by a source selection method provided for in this title. Supplies or services offered for sale, lease, or rental by public utilities are exempt from this requirement if the prices of the supplies or services are regulated by the public service commission or other governmental authority.

(2) ~~At the time that~~ When the department or another agency opens bids or proposals, if a supplier's current publicly advertised or established catalog price is received at or before the time that the bids or proposals are opened and is less than the bid of the lowest responsible and responsive bidder or offeror or improves upon the conditions for the best proposal received using the same factors and weights included in the proposal, the department or agency may reject all bids and purchase the supply from that supplier without meeting the requirements of 18-4-303 through 18-4-306.

(3) An office supply procured by the department's central stores program may be purchased by an agency, without meeting the requirements of 18-4-303 through 18-4-306, from a supplier whose publicly advertised price, established catalog price, or discount price offered to the agency is less than

³⁹

The Committee considered this bill as LC 0058. The bill number provided here is the number given, post introduction, to the legislation for consideration during the 57th Session (2001).

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the price offered by the central stores program if the office supply conforms in all material respects to the terms, conditions, and quality offered by the central stores program. A state office supply term contract must include a provision by which the contracting parties acknowledge and agree to the provisions of this subsection.

(4) (a) Under rules adopted by the department, an agency may request from the department authorization for an alternative procurement method.

(b) A request for authorization must specify:

(i) the problem to be solved;

(ii) the proposed alternative procurement method;

(iii) the reasons why the alternative procurement method may be more appropriate than a method authorized by law; and

(iv) how competition and fairness will be achieved by the alternative procurement method.

(c) Within 30 days after receiving the request, the department shall:

(i) evaluate the request;

(ii) approve or deny the request; and

(iii) issue a written statement providing the reasons for its decision.

(d) Whenever the department approves a request submitted under this section, the department:

(i) may authorize the alternative procurement method on a trial basis; and

(ii) if the alternative procurement method is employed, shall make a written determination as to the success of the method.

(e) If the department determines that the alternative procurement method is successful and should be an alternative that is generally available, it shall promulgate rules that establish the use of the alternative procurement method as an additional source selection method. The rules promulgated by the

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department under this subsection must reflect the purposes described in 18-4-122."

If the proposed legislation is adopted, the DOA and other agencies will at least have the opportunity to employ procurement techniques beyond "low bid". To the extent that contracts are issued, particularly for services, the challenge will be to ensure the state's best interests during the entire process--from drafting the RFP (or other solicitation tool) to the completion of the contract and final contract payment.

Procurement Management Teams

During and subsequent to the presentation by Ms. Bickelman, several Committee members voiced or reiterated their interest in the concept and practice of procurement management teams.⁴⁰ There are a couple of basic tenets underlying the team concept. The first is reflected in the belief that "two heads are better than one", and the second in the principle that "many hands make light work".

In the first case, a management team might consist of:

- C the manager of the program, for his or her knowledge and understanding of the program's needs;
- C a procurement officer, for his or her knowledge and understanding of procurement methods and processes. In Massachusetts, each procurement team is lead by an OSD manager.

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See SAIC *Minutes*, January and February 2000 meetings, generally, and March 2000 meeting, generally, and, specifically, on pp. 21-24 of the *Minutes*.

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- C an expert in contracts, such as a staff attorney or paralegal, for his or her knowledge and understanding of the integration of procurement processes and documents with contract administration, management, monitoring, and enforcement.

By creating a team of experts who have different perspectives, experience, training, responsibilities, and so on, a synergy can occur that would be virtually impossible with only one person responsible for the many facets of a procurement through contract completion. Thus, two (or three) heads are better than one.

In the second case, each team member can assume responsibility for a portion of the overall procurement rather than for the whole thing. The thought is that a given task is more easily done by "Jill" who is already expert than by "Jack" who is less experienced, knowledgeable, or skilled at the task. Similarly, Jack will take on the tasks at which he is more skilled, etc., than is Jill or another team mate.

To some extent, Montana's state agency staff may engage in a contract management team approach of sorts, albeit not nearly to the degree that Massachusetts staff do. Some Committee members telegraphed their support for the team concept, as well as their desire for enhanced "procurement management team" efforts in Montana.⁴¹

Quality Assurance

Quality assurance has at least a couple of meanings within the Massachusetts example, and probably elsewhere. In the first case, the

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The support is visible in comments made by SAIC members (see *Minutes* from March 31, 2000 meeting), and in the Committee's support of House Bill No. 48 (in Appendix C) to expand procurement and contract staff capacity, particularly education and training.

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Quality Assurance Unit (QA), composed of staff from the OSD and the Office for Administration and Finance (ANF), assume the responsibility of ensuring that purchasing regulations and processes are followed. The goal here is to make sure that internal rules and procedures are being consistently and appropriately followed. In the second case, the QA units also strive to ensure that the PMTs are succeeding in administering, monitoring, and enforcing the contracts for which they are responsible.

This two-pronged approach to quality assurance addresses both form (regulations and processes) and substance (results achieved). According to Ms. Bickelman, the entire QA program is founded on quality in every process, input, factor, task, and result.

Summary for Massachusetts

What is widely considered to be a remarkable success in procurement and contracting reforms in Massachusetts originated with the confluence of necessity and opportunity. Driven by fiscal considerations, the desire to improve the efficiency and effectiveness of the state's contracts, and the support of high-level decision makers, officials throughout state government set out to simplify, streamline, and enhance the state's procurement and contracting processes--and ensure the quality of program results achieved through contracting.

Elemental to Massachusetts's success has been recognizing "value" over cost or price, fostering teamwork in addition to individual effort and contribution, and ensuring quality throughout the procurement and contracting cycle. To accomplish the transition, state officials and vendors were compelled to think differently about the delivery of supplies and services. Detailed specifications for inputs have metamorphosed into

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measurable performance of outputs, outcomes, and results. The traditional hierarchy and "pyramid" structure recognized in decision making has given way to collaborative approaches and the decentralization of authority. Foremost, perhaps, accountability for the quality of results produced has replaced the historical practice of only measuring the attributes, dimensions, or specifics of the constituent inputs. In short, it is the results that matter most.

Oregon

There are similarities between Oregon and Massachusetts. For example, each is bordered by an ocean, each has a major seaport, and each is only one state away from Canada. From there, however, the similarities begin to fade.

With respect to state procurement and contracting, Massachusetts is a "model procurement act" state; Oregon is not. The procurement process in Massachusetts is highly decentralized, but not so in Oregon. Even with the dissimilarities, however, public procurement in Oregon is also widely viewed as highly successful and innovative.

Oregon was among the first states to employ on-line technology in procurement and contracting. At first, notification to vendors of invitations to bid or requests for proposals were made available through a dial-up, bulletin board system. While that may seem crude by today's methods, it was at the time--in 1992--at the cutting edge. With the close of the 20th century and the dawning of a new millennium, Oregon continues to be a leader among the states in its approach to procurements and contracting.

The SAIC was privileged to have Dugan Petty, Oregon's Chief Procurement Officer, as a presenter on the topic of procurement and

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contracting practices in Oregon. Mr. Petty highlighted several aspects of procurement and contracting in Oregon and responded candidly to SAIC members' questions and concerns.

PROCUREMENT AND CONTRACTING IN OREGON

Summarized from the Comments of Dugan Petty,
Chief Procurement Officer, State of Oregon

January 21, 2000

* * * * *

INTRODUCTION

Oregon statutes provide broad, minimum requirements and are applicable to state agencies and to all other public agencies as well, including local governments. With respect to procurement and public contracting, the Oregon Department of Justice (DOJ) and the Department of Administrative Services (DAS) have rule making authority and responsibility. The DAS is statutorily authorized as the state's purchasing agency for supplies and services, and local boards have parallel authority for local governments.

- **Competition:**

The state promotes and achieves competition through a "best value" system that utilizes Requests for Proposals (RFPs) or the bidding process, recognizing that best value may be achieved through delivery or quality of the goods or services, not just lowest price. If a process other

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than RFP or bidding is used, the purchasing agency must find that an exemption will result in less cost and is not likely to increase favoritism or discourage competition. A purchase made by other than RFP or bid must be preceded by a public hearing.

- **Preferences in Purchasing:**

Oregon utilizes a reciprocal preference system that works against bidders from other states in which resident bidders have a statutory in-state preference. In Oregon, if there is a tie in bidding, the award goes to the local bidder. Oregon also has several other preferences:

- o an in-state printing preference for printing services;
- o a statutory preference for the purchase of recycled products;
- o state or local governments are required to buy goods from certified non-profit organizations that employ people with disabilities. (At least 75 per cent of the employees must be disabled individuals for the organization to qualify.)

Vendors who benefit directly from the legislative preferences are reluctant to forego the preference, but non-benefitting vendors are increasingly bringing pressure to eliminate the preferences and "level the playing field".

- **Model Rules:**

Statute gives both the DAS and the DOJ, through the Attorney General, the authority to promulgate model procurement rules. Local agencies may adopt either the DAS rules or the DOJ rules, or may develop their own rules. State statute provides that the DOJ rules are binding unless

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the local agency develops its own rules. To minimize conflicts, the DAS rules deal with matters not dealt with by DOJ rules.

- **Vendor and Purchaser Notification:**

Oregon has adopted and deployed technology to inform vendors and purchasers of pending state procurements without incurring great cost. The Vendor Information Program (VIP), an electronic bulletin board system, was initiated in 1992 and reduced administrative and mailing costs. The state discussed the system with the vendors and provided them with free software for a dial-up modem connection, if the vendors wished to participate. State agencies were encouraged to participate so they could do business in a more efficient and effective manner. Small vendors stated that the VIP made bidding on state contracts more accessible than ever before. Oregon now has made the transition from the dial-up bulletin board to an Internet website connection. Local governments can join the program for a fee, allowing them to access vendor information or make purchases off state contracts. There is an interstate agreement between Washington and Oregon that allows political subdivisions to purchase from either state's contracts. The response from vendors in both states has been positive because they now have one contract, they know what the price is, and they know who is participating in the contract. Vendors typically make a profit and their profit margins increase as the volume of sales rises.

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- **Consortium Buying:**

Privatization, through contracting or otherwise, can eliminate competition if competition is not carefully preserved. Consortium buying can stretch the buying power of public entities, thus lowering costs to taxpayers. It has been done for years in the private sector, and is gaining popularity in the public sector. Closing-out small in-state businesses that do not have the capacity to participate may be a risk in some jurisdictions but is not a large concern in Oregon because large business has already replaced many small businesses. Displacement occurs whether or not the state is a buyer from the consortium. An outreach program can be developed and should be in place to assist local businesses in making bids and doing business with the state and other public entities.

The SAIC members' were as engaged with the status and procedures in Oregon as they were with Massachusetts's. The SAIC members interacted studiously with Mr. Petty and, in no particular order of priority, seemed most interested in several areas.

Vendor Notification

Vendor notification and the ability of vendors to compete for state business was an issue to the Committee even before Mr. Petty's presentation. Committee members were keenly interested in how a balance could be achieved or maintained between maximizing efficiency in procuring supplies and services and attending to the needs and economic health of, especially, local and small businesses.

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According to Mr. Petty, competition is a cornerstone of Oregon procurements. Widespread and timely notification to potential bidders of available state purchases was perceived by both the state and vendors as necessary to the goal. Thus, the VIP system was created and has been updated. Reportedly, vendors and public purchasers both recognize the value of applying technology--online notification, bid/proposal submission, bid award, product ordering, invoicing, payment, and so forth--and have embraced it.⁴²

Preferences in Procurement

Like many states and sub-state jurisdictions, Oregon has numerous requirements to give preferences to certain vendors. Not commenting on the merits of any preference, specifically, Mr. Petty said that preferences, in general, are coming under increasing scrutiny and are falling into disfavor. He noted that in some states, vendors were being denied contracts to out-of-state public purchasers because of preferences given to in-state or resident bidders. Oregon has developed a listing of legally-based preferences, by state, that is used by many public jurisdictions as *the* reference source for determining which states do and don't prescribe preferences and the nature of the preferences.

It was noted that Montana has several statutory preferences⁴³, some of which have harmed and are likely to continue harming Montana

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Mr. Petty said that vendors who wish to participate in the VIP actually pay the state a fee for the service. Therefore, the notification system effectively pays for itself and costs the taxpayers little, if any, direct state funding. See *Minutes of the SAIC*, January 21, 2000, Montana Legislative Services, State Capitol, Helena, MT, pp. 3-4,

⁴³ See Title 18, chapter 1, part 1, MCA, generally, and Title 18, chapter 5, parts 3 through 5, MCA.

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businesses.⁴⁴ Procurement staff from the DOA also testified that some of the preferences--small business and the use of Montana-made products were mentioned--are very difficult to administer and have had little, if any, positive effect for Montana businesses.

After considered examination, both during Mr. Petty's presentation and subsequently, the Committee determined that several statutorily prescribed preferences are not in the state's best interest. Therefore, the SAIC has recommended legislation that proposes to revise some of the preferences and repeal others.⁴⁵

Summary of Other States

After studying information provided on how other states undertake procurements of services and supplies, particularly through contracts, the SAIC found that most have encountered challenges similar to those experienced in Montana. Increasingly, other states are turning to "best value" approaches and relying less upon the traditional "low bid" approach, particularly for contracts involving professional, technical, or personal services.

At the same time, many jurisdictions are increasing their focus on the quality of services and supplies. That focus is manifested in several ways, including:

- C employing technology to the maximum extent possible to foster competition and to make the procurement cycle as efficient and effective as possible;

⁴⁴ See testimony of Tryg Dahl in *Minutes* of the SAIC, February and March, 2000.

⁴⁵ See Appendix C, Senate Bill No. 90(57th Legislature), by request of the SAIC.

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- C expanding and professionalizing the procurement work force;
- C requiring or providing continuing education and training of procurement staff;
- C designing and executing systemic approaches that employ the cooperation and collaboration of "procurement management teams" composed of procurement professionals, legal professionals schooled in contracts, and professional contract administrators and managers who are both trained and authorized to make sure that what is being purchased is what is delivered.

Increasingly, states are adapting to and adopting more open approaches to competition. These trends include minimizing or eliminating preferences, moves which "level the playing field" and promote access (1) by more numerous and different vendors to state business and (2) by state or other public entities to previously unavailable or uninterested vendors who may be able to deliver supplies or services in a manner that promotes the best interests of the public.

In the final analysis, the SAIC concluded that Montana can improve its procurement and contracting programs, processes, and policies by also taking actions that other states have done or may be planning on doing. These actions include:

- C expanding and professionalizing the procurement work force;
- C enhancing the state's ability to more effectively manage contracts, programs and projects;
- C increasing the capacity of state procurement and contracting staffers through continuing education and training; and
- C joining the trends begun elsewhere of minimizing any reliance on statutory preferences in procurement processes.

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Findings

Over the course of about 12 months, the SAIC studied various aspects of public procurement and contracting. The members reviewed numerous articles, monographs, staff reports, and other documents bearing on the subjects. They also solicited and heard testimony from vendors, legal experts, procurement professionals, and others. The Committee's efforts reflect a range of findings and conclusions.

- C The state of Montana is increasingly relying on contracts and other procurement techniques to provide the products and services that its citizens expect it to provide.
- C Contracts to which the state is a party are increasingly complex, of higher value, and more visible to the public than in the past. As a consequence, the performance of public contracts is being held to higher levels of scrutiny that can lead to public criticism of the legislature or administration.
- C Poor performance on major projects and programs that are delivered through contracts causes real harm to "customers" and program beneficiaries. Those who can be impacted negatively range from direct beneficiaries to more indirect recipients and stakeholders, including service providers and other vendors, state and local government personnel, legislators and other elected officials, and of course, the taxpayers and citizens in general.
- C As procurements and public contracts become more complex, more highly valued, and more closely reviewed, it will become increasingly necessary to maximize the potential for procurements and contracts to succeed and to minimize the potential for poor product quality, service disruptions, or outright failures, regardless of the cause. As a

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result, more and more highly trained staff may be necessary to ensure the state's best interests.

- C Whatever form or structure a state's procurement and contracting program may take, team work and clear, frequent, consistent communication among all stakeholders will increase the probability of success. Processes exist and can be adapted and followed to routinize collaboration if not cooperation among individuals who, as vendors, purchasers, program and project managers, and contract enforcers, are responsible for delivering supplies and services through procurement and contracting.
- C State policies can both help and hinder procurement and contracting programs. Consequently, the effects of state policy should be monitored constantly, particularly policy enacted by law.
- C A state's interests can be supported by professionals who are highly trained and highly committed to ensuring that the state is getting no less than what it bargained for, particularly if state policy, through budget and other resource allocations, makes effective procurement and contracting programs a priority.

Options for Legislative Consideration

The Committee recommends two bills for consideration by the 57th Legislature, both of which result from the examination undertaken under SJR 9.

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Senate Bill No. 90

The first of the bills, Senate Bill No. 90, is a general revision of government contracting laws. The full text of SB 90 is contained in Appendix C. The main components of the bill can be summarized as follows:

- C expands the general application of the procurement laws;
- C clarifies employee and former employee contract involvement restrictions;
- C provides that motor vehicle purchase requisitions may be submitted in the manner specified by the DOA;
- C abolishes the requirement that political subdivisions apply a resident bidder preference for the procurement of goods;
- C clarifies the interest rate on overdue payments;
- C makes the resident bidder preference for state government procurement of goods reciprocal;
- C abolishes the Montana-made goods preference;
- C exempts certain purchases from the general requirements of the law;
- C allows alternative purchasing methods;
- C revises sole source purchase criteria; and
- C clarifies the duration of certain contracts.

House Bill No. 48

The second of the two bills resulting from the SJR 9 study is aimed at addressing what the Committee viewed as advisable enhancements to the state's procurement and contracting program. House Bill No. 48 appropriates about \$443,000 over the 2002-03 biennium to the DOA for

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several initiatives.⁴⁶ The full text of HB 48 appears in Appendix C and may be summarized as follows:

- C provides funding for a position within the department to: develop and provide a vendor outreach program to help businesses do business with the state; provide training to procurement staff; and develop and implement a certification program for state contracts officers and contracts assistants;
- C provides for certification programs that are intended to serve, in part, as competency indicators for certain decisions regarding hiring or retention as a contracts officer or assistant or as a contracts manager;
- C provides funding for a contracts officer position, a contracts assistant position, and a contracts manager position;
- C provides funding to deploy a system to: notify and disseminate information to vendors regarding contract opportunities; allow for online vendor registration, tracking, and notification; and allow for the submission of bids and proposals and for the award and payment of claims over the internet or through other technology that can facilitate electronic commerce; and
- C provides funding for equipment and supplies for the contracts officer, assistant, and manager positions.

Options for the Executive Branch

There are a number of actions that the Executive Branch could take without specific legislative authorization or direction.

⁴⁶ HB 48 was numbered as LC 0197 when it was considered by the Committee.

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Inventory Technical and Legal Support

The state could benefit from a comprehensive inventory and examination of the use of technical and legal support in procurement and contracting processes among all agencies of state government. Identifying where and how technical and legal resources are deployed and used should provide valuable management information. Administrative and budget managers might be able to ascertain how these resources could be used more effectively among and within state agencies.

Availability and Use of Technical and Legal Support

Subsequent to the inventory of technical and legal support resources, the administration could initiate discussion among agencies about the best use of technical and legal support and the deployment of resources. The discussions might include an analysis of the benefits and detractions of the status quo, as well as of alternatives, such as centralizing legal support resources in the DOJ or DOA.

Contract Enforcement

Contracts and the projects they implement are not self executing. They require nearly constant monitoring and management. In some instances, they may require some higher level of enforcement action. Consequently, in concert with the responsibilities assigned under Title 17, MCA, the staff within the (governor's) office of the budget director, the DOA, or elsewhere, could compile and analyze the cost of contract enforcement to state agencies. At the very least, any funds expended for contract enforcement are spent on items that are not the principle mission of the contracting agency. It could be enlightening to know what those costs are.

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Business Processes for Contracting

Individual agencies or the DOA acting as the statutorily designated purchasing authority could examine agency business practices with respect to procurement and contracting. Part of the effort could be to ascertain the ostensible reasons why processes work the way they do, whether or not the reasons are reasonable and valid, and whether some other process might improve results. In some, perhaps many cases, process improvements could be effected by revising administrative rules or by simply changing work flow.

Training and Education

Whether or not HB 48 is passed and approved, the DOA should investigate the benefits of continuing education and training for professionals in: procurement; contract administration, management, and enforcement; and project management. The value, complexity, range, and scrutiny associated with state contracts is likely to increase. Consequently, it may be advisable to take action to ensure that procurement and contract professionals gain or enhance the skills applicable to and necessary for successful procurement and contract programs.

Options for the SAIC

The Committee worked diligently and faithfully to conduct the study envisioned in SJR 9. Even though the members expanded their knowledge and understanding of procurement and contracting issues, much remains to be done.

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Continue the Study of Procurement and Contracting

The Committee can continue to provide a forum for discussing options to ensure the state's interests are protected through revised or enhanced deployment of technical and legal resources. While the day-to-day deployment of resources is largely the domain of the executive branch, legislators may wish to monitor activities to assess the effects of management decisions. Additionally, further investigation of resource capacity, availability, cost, and so forth may also be issues of interest.

Audit State Contracting Procedures

Testimony provided to the Committee suggested that contracting procedures vary among and even within state agencies. A management or performance audit could be proposed, the purpose of which would be to investigate the processes agencies follow in procuring supplies and services, particularly procurements made through contracts. Levels of technical and legal support could be identified and measured for various projects and successful techniques and programs highlighted. Deficiencies could also be noted and evaluated, possibly accompanied by options or recommendations for improving efficiency or effectiveness.

Vendor Outreach

The Internet and whatever its successor might be certainly provide a new avenue for the state to implement an aggressive vendor outreach program. The Committee has recommended, through HB 48, the development and implementation of enhanced vendor outreach. Whether or not HB 48 is approved, the legislature should remain apprised of the state's efforts to ensure competition for the state's business. Even if the outreach

CHAPTER 7 -- SUMMARY AND CONCLUSION

project in HB 48 is not funded, the Committee may wish to monitor new or revised approaches to vendor outreach.

APPENDICES TO *THE PARTY OF THE FIRST PART*:

Appendix A. Senate Joint Resolution No. 9

Appendix B. Interested Persons List

Appendix C. Proposed Legislation

Appendix D. Glossary

Appendix E. Selected References

APPENDIX A -- SENATE JOINT RESOLUTION 9, 56TH LEGISLATIVE SESSION

SENATE JOINT RESOLUTION NO. 9

INTRODUCED BY M. COLE, C. AHNER, S. BARTLETT, G. JERGESON, B.
REHBEIN, M. TAYLOR

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF
REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN
INTERIM STUDY OF THE STATE'S LAWS AND PROCEDURES THAT
GOVERN THE DEVELOPMENT, ADMINISTRATION, AND ENFORCEMENT OF
CONTRACTS WITH PRIVATE SECTOR VENDORS TO COMPLETE
GOVERNMENT PROJECTS OR DELIVER GOVERNMENT SERVICES.

WHEREAS, a national trend toward privatization of government services
has led many states to closely examine and refine their contracting laws and
procedures; and

WHEREAS, the State of Montana is relying to an ever-greater degree on
numerous types of services provided through contracts with private sector
vendors; and

WHEREAS, the Department of Administration and other entities have
indicated that there is a large body of new information deriving from other
states' contract development and administration experiences that may be of
great value to the Legislature and the State of Montana; and

WHEREAS, Montana's large-scale contracts with private sector vendors
include a diverse range of services, such as prisons, managed care, and
information technology; and

APPENDIX A -- SENATE JOINT RESOLUTION 9, 56TH LEGISLATIVE SESSION

WHEREAS, the success or failure of government programs provided by private sector vendors hinges on the ability of the state to effectively develop, negotiate, and enforce contracts with the private sector; and

WHEREAS, risks to state resources are inherent in the contracting process; and

WHEREAS, both the Joint Oversight Committee on State Management Systems and the Legislative Finance Committee have expressed concerns about an absence of adequate protection of the state's interests throughout the contracting process; and

WHEREAS, it is a responsibility of the Legislature to examine whether adequate, consistent policies and procedures are in place to ensure that appropriate contracting practices are in use.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

(1) That the Legislative Council be requested to designate an appropriate interim committee to review the laws and practices associated with the state's contracting with private sector vendors.

(2) That the study include but not be limited to the following:

(a) a thorough review of current law governing contracting, procurement, and contract enforcement;

(b) a thorough review of current state agency contracting, procurement, and enforcement procedures;

(c) an examination of how other states have addressed increases in the scale and scope of contracts with private sector vendors, including other states' experiences with centralizing state procurement, contracting, and contract enforcement responsibilities in special review boards, commissions, and councils;

APPENDIX A -- SENATE JOINT RESOLUTION 9, 56TH LEGISLATIVE SESSION

(d) a review of recent Montana experiences with contracting for services and contract enforcement, paying particular attention to large-scale contracts and the lessons learned from the experiences;

(e) an examination of the possibilities for providing agencywide consistency in the contracting process and enhancing protection of the state's interests in contract negotiation and enforcement; and

(f) an examination of the current level of review and technical support provided during the development of a contract.

(3) That the Legislative Services Division provide the primary staff support to the committee that is assigned this study, but that the committee be strongly encouraged to enlist staff assistance from the entire Legislative Branch.

(4) That the committee assigned this study report to the 57th Legislature and the Governor its findings and recommendations. The report may include but is not limited to the following:

(a) lessons learned as a result of the state's experiences with large-scale contracts;

(b) recommendations for improving and standardizing the state's contracting laws and procedures to provide adequate enforcement of contract provisions and ensure protection of state interests; and

(c) any legislation the committee requests to implement its recommendations.

- END -

APPENDIX B -- INTERESTED PERSONS LIST

Benefits Corp, Deferred Compensation, Department of Administration
Cascade County Sheriff's Department, Great Falls, Montana
Counseling Consortium, Helena, Montana
Director, Department of Administration
Montana School Boards Association
Vietnam Veterans of America
Mark E. Adams, KPMG, Helena, Montana
John Altenburg, Retired Firefighters Association, Kalispell, Montana
Robert Andersen, Budget Analyst, Governor's Office
Bob Anez, Associated Press
Dan Antonietti, Helena, Montana
Mark Baker, Anderson and Baker Law Offices, Helena, Montana
Leslie Bales, City of Columbia Falls, Columbia Falls, Montana
Herb Ballou, Military Order of the Purple Heart, Helena, Montana
Dennis Baran, Great Falls, Montana
Leo Barry, Helena, Montana
Tim Bergstrom, Montana State Firemen's Association, Billings, Montana
Verner Bertelson, Montana Senior Citizens' Association, Helena, Montana
Tom Bilodeau, Montana Education Association, Helena, Montana
Stuart Blundell, Integrated Geoscience, Inc., Helena, Montana
Doug Booker, Department of Military Affairs
Kathy Bramer, Office of Public Instruction
Joe Brand, Veterans of Foreign Wars, Helena, Montana
Linda Brandner, Northwest Environmental Business Council, Avon, Montana
Warran Brass, Association of Montana Retired Public Employees, Helena,
Montana
Joyce Brown, Benefits Bureau, Department of Administration
Mike Brown, Office of Sen. Conrad Burns, Great Falls, Montana
Tom Burgess, MEA-MFT, Helena, Montana

APPENDIX B -- INTERESTED PERSONS LIST

Greg Burham, Missoula Vet Center, Missoula, Montana
Tim Busby, Homeless Stand Down 2000, East Helena, Montana
Virginia Cameron, Department of Military Affairs
Carole Carey, Public Employees Retirement Board
Diane Cattrell, Montana State University, Bozeman, Montana
Patrick Chenovick, Montana Supreme Court
Mick Chesterfield, Game Wardens' Association, Three Forks, Montana
Pat Clinch, Helena, Montana
Benjamin D. Cohen, Scott-Levin, Newton, Pennsylvania
Kathy Crego, Human Resource Services, University of Montana, Missoula,
Montana
Pat Crowley, Veterans' Affairs Division, Department of Military Affairs
Jim Currie, Deputy Director, Department of Transportation
Tryg Dahle, Intellicom, Belgrade, Montana
Ron Davis, Helena, Montana
John Denherder, Association of Montana Retired Public Employees, East
Helena, Montana
Alma Dickey, Prisoners of War, Helena, Montana
Duane Dockter, Montana Retired Teachers and School Personnel
Association, Great Falls, Montana
Ron Drake, Helena, Montana
Victor Duran, Butte, Montana
Jim Dusenberry, Montana Fire Districts Association, Helena, Montana
Pam Eagan, Montana AFL-CIO, Helena, Montana
Marvin Eicholtz, Procurement and Printing, Department of Administration
Vernon Erickson, Montana State Fireman's Association, Missoula, Montana
Lars Ericson, Montana State Council of Carpenters, Helena, Montana
Emil Eschenburg, Helena, Montana
Luke Evans, Stateside Associates, Arlington, Virginia

APPENDIX B -- INTERESTED PERSONS LIST

Larry Fasbender, Helena, Montana
Eric Feaver, MEA, Helena, Montana
Geoffrey A. Feiss, Montana Telecommunications Association, Helena,
Montana
Meredith Fite, Montana Retired Firefighters Organization, Missoula, Montana
Tom Foley, AFSCME ALF-CIO, Montana Council 9, Helena, Montana
Joe Foster, Department of Military Affairs
Mike Foster, Montana Contractors' Association, Helena, Montana
Mary Jo Fox, Governor's Office
Loran Frazier, School Administrators of Montana, Helena, Montana
Angela Fultz-Nordstrom, Secretary of State's Office
Steve Garrison, Department of Transportation
Robert Graler, Marine Corps League, Corvallis, Montana
Robert Griffith, Public Employees Retirement Board, Helena, Montana
Jack Guipre, Helena, Montana
Roger Hagan, Montana National Guard, Helena, Montana
George Hageman, Board of Veterans' Affairs, Jordan, Montana
Mike Hankins, Helena, Montana
Alec Hansen, Montana League of Cities and Towns, Helena, Montana
Mike Hanshew, Department of Public Health & Human Services
Earl Hanson, Helena, Montana
Mike Harkins, Helena, Montana
Larry Harlan, Helena, Montana
Jim Heck, Game Wardens' Association, Bozeman, Montana
Jim Heffernan, Marine Corps League, Helena, Montana
Alton Hendrickson, Kalispell, Montana
William Hill, Helena, Montana
Gene Hoffman, AMBRE, Helena, Montana
Sheila Hogan, Career Training Institute, Helena, Montana

APPENDIX B -- INTERESTED PERSONS LIST

Darrell Holzer, AFL-CIO, Helena, Montana
Joe Horan, Great West, San Ramon, California
James Jacobsen, Veterans' Affairs Division, Department of Military Affairs
Charles Johnson, Lee Newspaper State Bureau, Helena, Montana
J. Riley Johnson, National Federation of Independent Business, Helena,
Montana
Kathleen Jones, Capital Television Bureau, Helena, Montana
Don Judge, Montana AFL-CIO, Helena, Montana
W. James Kembel, Helena, Montana
Steve Kologi, Association of Montana Retired Public Employees, Helena,
Montana
Tom Kotynski, Great Falls Tribune, Great Falls, Montana
Carol Lambert, Public Employees Retirement Board, Hammond, Montana
Polly Latray-Holmes, U.S. Department of Labor, Helena, Montana
Howard Lawson, Retired Teachers Association, Butte, Montana
Glen Leavitt, Office of the Commissioner of Higher Education
Dave Lewis, Office of Budget and Program Planning, Governor's Office
Kenneth Lindstrand, Retired Firefighters' Association, Great Falls, Montana
Larry Longfellow, Veterans of Foreign Wars, Helena, Montana
Rob E. Lougee, Disabled American Veterans, Fort Harrison, Montana
Kathy Lubke, Secretary of State's Office
Buddy Malee, MFT-AFT, Butte, Montana
C. Hal Manson, American Legion, Helena, Montana
David Marshall, Disabled American Veterans, Helena, Montana
Thaddeus Mayer, Board of Veterans' Affairs, Missoula, Montana
Jani McCall, City of Billings, Billings, Montana
Paul McCann, Retired Firefighters' Association, Fairfield, Montana
Bea McCarthy, Senator, Montana State Legislature, Anaconda, Montana
John McEwen, Personnel Division, Department of Administration

APPENDIX B -- INTERESTED PERSONS LIST

Troy W. McGee, Montana Police Protective Association, Helena, Montana
Troy McGee, Jr., Public Employees Retirement Board, Helena, Montana
Jack McGlynn, United Veterans Committee, Butte, Montana
Ruben McKinney, Board of Veterans' Affairs, Havre, Montana
Gene Miller, Retired Patrolmen's Association, Great Falls, Montana
Terry Minow, MEA-MFT, Helena, Montana
Wayne Mooney, Disabled American Veterans, Victor, Montana
Gordon Morris, Montana Association of Counties, Helena, Montana
Sheryl Motl, Purchasing Bureau, Department of Administration
John Nelson, Prisoners of War, Whitefish, Montana
Carl Nordberg, American Legion, Helena, Montana
Mike O'Connor, Public Employees Retirement Division, Department of
Administration
Harlan Orham, Great Falls, Montana
Robert J. Pavlovich, Representative, Montana State Legislature, Butte,
Montana
Robert Payne, Military Order of the Purple Heart, Stevensville, Montana
Bob Phillips, Billings, Montana
Michael Pichette, Montana Power Company, Helena, Montana
Butch Plowman, Montana School Boards Association, Helena, Montana
John E. Prendergast, Adjutant General, Department of Military Affairs
Dave Puyear, Montana Rural Education Association, Helena, Montana
Madalyn Quinlan, Office of Public Instruction
Ray Read, Vietnam Veterans of America
Tim Reardon, Department of Transportation
Bill Reed, MPRA, Missoula, Montana
Mick Robinson, Governor's Office
Mike Royer, Youth Challenge, Dillon, Montana
Patty Rukstad, Montana State University - Billings, Billings, Montana

APPENDIX B -- INTERESTED PERSONS LIST

Bill Salisbury, Department of Transportation
Rick Salyer, Homeless Stand Down, Helena, Montana
Kathy Sampson, Department of Administration
Thomas O. Sanford, Retired Highway Patrol Officers' Association, Helena,
Montana
Amy Sassano, Office of Budget Planning and Preparation, Governor's Office
Thomas Schneider, MPEA, Helena, Montana
Art Sell, American Legion, Big Timber, Montana
David Senn, Teachers Retirement System, Department of Administration
Timothy Shanks, Montana Police Protective Association, Great Falls,
Montana
Dennis Smith, Gallatin Gateway, Montana
Wade Smith, Veterans of Foreign Wars, Butte, Montana
James E. Smith, Helena, Montana
Carroll South, Board of Investments, Department of Commerce
Bill Steele, Great Falls, Montana
Paula Stoll, Labor and Employee Relations, Department of Administration
Terry Teichrow, Public Employees Retirement Board, Helena, Montana
Alve Thomas, Retired Teachers' Association, Helena, Montana
Jean Thompson, Public Employees Retirement Board, Billings, Montana
Diane Tordale, Department of Transportation
Joe Underkofler, Fort Harrison Veterans' Medical Center, Fort Harrison,
Montana
Joe Upshaw, 163rd Infantry Association, Helena, Montana
Stacey Vestal, Montana Association of School Board Officials, Lewistown,
Montana
Steve Wade, Browning, Kaleczyc, Berry & Hoven, Helena, Montana
Joe Walsh, Bozeman, Montana

APPENDIX B -- INTERESTED PERSONS LIST

Don Walters, Montana Retired Teachers and School Personnel Association,
Bozeman, Montana

Tom Wells, Bozeman, Montana

Mary Whittinghill, Montana Taxpayers' Association, Helena, Montana

David Williams, Military Order of the Purple Heart, Missoula, Montana

Jerry Williams, Police Officers' Association, Butte, Montana

Bill Woon, 1st Special Services Force, Helena, Montana

APPENDIX C -- PROPOSED LEGISLATION

SENATE BILL NO. 90

INTRODUCED BY P. EKEGREN

BY REQUEST OF THE STATE ADMINISTRATION, PUBLIC RETIREMENT SYSTEMS,
AND VETERANS' AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING GOVERNMENT CONTRACTING LAWS; EXPANDING THE GENERAL APPLICATION OF THE PROCUREMENT LAWS; CLARIFYING EMPLOYEE AND FORMER EMPLOYEE CONTRACT INVOLVEMENT RESTRICTIONS; PROVIDING THAT MOTOR VEHICLE PURCHASE REQUISITIONS MAY BE SUBMITTED IN THE MANNER SPECIFIED BY THE DEPARTMENT OF ADMINISTRATION; ABOLISHING THE REQUIREMENT THAT POLITICAL SUBDIVISIONS APPLY A RESIDENT BIDDER PREFERENCE FOR THE PROCUREMENT OF GOODS; CLARIFYING THE INTEREST RATE ON OVERDUE PAYMENTS; MAKING THE RESIDENT BIDDER PREFERENCE FOR STATE GOVERNMENT PROCUREMENT OF GOODS RECIPROCAL; ABOLISHING THE MONTANA-MADE GOODS PREFERENCE; EXEMPTING CERTAIN PURCHASES FROM THE GENERAL REQUIREMENTS OF THE LAW; ALLOWING ALTERNATIVE PURCHASING METHODS; REVISING SOLE SOURCE PURCHASE CRITERIA; CLARIFYING THE DURATION OF CERTAIN CONTRACTS; AMENDING SECTIONS 2-2-201, 2-17-403, 7-5-2309, 7-14-2404, 7-14-2406, 7-14-2716, 17-8-244, 18-1-101, 18-1-102, 18-1-103, 18-1-111, 18-1-404, 18-2-306, 18-4-123, 18-4-132, 18-4-133, 18-4-141, 18-4-301, 18-4-302, 18-4-306, 18-4-313, 18-5-308, 18-7-107, AND 60-2-112, MCA; REPEALING SECTION 18-1-112, MCA; AND PROVIDING EFFECTIVE DATES, AN APPLICABILITY DATE, AND A TERMINATION DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-2-201, MCA, is amended to read:

"2-2-201. Public officers, employees, and former employees not to have interest in contracts --local government waiver. (1) Members of the legislature; state, county, city, town, or township officers; or any ~~deputy~~ deputies or ~~employee~~ employees of an

APPENDIX C -- PROPOSED LEGISLATION

enumerated governmental entity may not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees if they are directly involved with the contract. A former employee may not, within 6 months following the termination of employment, contract or be employed by an employer who contracts with the state or any of its subdivisions involving matters with which the former employee was directly involved during employment.

(2) In this section, the term:

(a) "be interested in" does not include holding a minority interest in a corporation;

(b) "contract" does not include:

(i) ~~contracts awarded to the lowest responsible bidder or proposer based on competitive bidding procurement procedures~~ conducted after the date of employment termination;

(ii) merchandise sold to the highest bidder at public auctions;

(iii) investments or deposits in financial institutions that are in the business of loaning or receiving money;

(iv) a contract with an interested party if, because of geographic restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract. It is presumed that a local government could not otherwise reasonably afford itself of the subject of a contract if the additional cost to the local government is greater than 10% of a contract with an interested party or if the contract is for services that must be performed within a limited time period and no other contractor can provide those services within that time period.

(c) "directly involved" means the person directly monitors a contract, extends or amends a contract, audits a contractor, is responsible for conducting the procurement or for evaluating proposals or vendor responsibility, or renders legal advice concerning the contract;

~~(e)~~(d) "former employee" does not include a person whose employment with the state was involuntarily terminated ~~due to~~ because of a reduction in force or other involuntary termination not involving violation of the provisions of this chapter.

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~~(2) The governing body of a city, town, or county may waive the application of the prohibition contained in subsection (1) for a present or former city, town, or county officer or employee who in an official capacity does not influence the decisionmaking process or supervise a function regarding the contract in question. A governing body may grant a waiver under this subsection only after publicly disclosing the nature of the conflict at an advertised public hearing held for that purpose. In determining whether to grant a waiver, the governing body shall consider the following factors, where applicable:~~

~~—(a) whether the waiver would provide to a program or project a significant benefit or an essential skill or expertise that would otherwise not be available;~~

~~—(b) whether an opportunity was provided for open competitive bidding or negotiation;~~

~~—(c) whether the person affected is a member of a clearly identified group of persons that is the intended beneficiary of the program or project involved in the contract; and~~

~~—(d) whether the hardship imposed on the affected person or the governmental entity by prohibiting the conflict will outweigh the public interest served by avoiding the conflict."~~

Section 2. Section 2-17-403, MCA, is amended to read:

"2-17-403. Requisitions for purchases. All requisitions for motor vehicle purchases shall must be submitted to the department of administration ~~twice yearly at the times in the manner~~ that it the department specifies. ~~Other requisitions for automobile purchases may not be accepted by it unless the governor considers the purchase to be an emergency necessity."~~

Section 3. Section 7-5-2309, MCA, is amended to read:

"7-5-2309. Optional bidding preference for county resident. (1) If there are no out-of-state bidders for a contract subject to competitive bid under this part, the contract may be awarded to the lowest and best responsible bidder that is a county resident and that makes a bid that is no more than \$500 or 3% higher, whichever is less, than the bid of the lowest responsible bidder that is not a county resident.

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(2) If there is one or more out-of-state bidders for a contract for construction, repair, or maintenance of a building, road, or bridge that is in excess of \$50,000 and that is subject to competitive bid under this part, the state resident bid preference provided in 18-1-102(1)(a) applies.

(3) For the purposes of this section, "county resident" means a person, corporation, business, or other entity whose principal business location is within the county."

Section 4. Section 7-14-2404, MCA, is amended to read:

"7-14-2404. Competitive bids for county road contracts. Each bidder shall comply with the requirements of Title 18, chapter 1, part 2. The contract ~~shall~~ must be awarded to the lowest responsible bidder in accordance with the requirements of 18-1-102, ~~18-1-112~~, and Title 18, chapter 2, part 4, and the board may reserve the right to reject any ~~and all~~ bids. ~~When~~ If there is no prevailing rate of wages set by collective bargaining, the board shall determine the prevailing rate to be stated in the contract."

Section 5. Section 7-14-2406, MCA, is amended to read:

"7-14-2406. Contracts for bridges. (1) All bids for construction or repair of bridges ~~shall~~ must meet ~~these~~ the following requirements:

(a) If the department of transportation has adopted or established a standard plan and specifications, the bids must be submitted ~~thereon~~ on the standard plan and specifications.

(b) All bids must be sealed. Each bidder ~~shall~~ must meet the requirements of Title 18, chapter 1, part 2.

(2) The board may reject any ~~and all~~ bids. If a contract is awarded, the board shall ~~do~~ so award the contract in accordance with the requirements of 18-1-102, ~~18-1-112~~, and Title 18, chapter 2, part 4. ~~When~~ If there is no prevailing rate of wages set by collective bargaining, the board shall determine the prevailing rate to be stated in the contract. The contract must be entered with the unanimous consent of the members of the board.

(3) Before entering upon performance of the work, the contractor shall comply with the requirements of Title 18, chapter 2, part 2. For the purposes of those sections with

APPENDIX C -- PROPOSED LEGISLATION

relation to contracts with the board, a contract ~~shall~~ may not be completed until the board, while formally convened, affirmatively accepts all of the work ~~thereunder~~ under the contract."

Section 6. Section 7-14-2716, MCA, is amended to read:

"7-14-2716. Award of contract by local improvement district. (1) If the committee awards a contract, it shall ~~do so~~ award the contract in accordance with the requirements of 18-1-102, ~~18-1-112~~, and Title 18, chapter 2, part 4. ~~When~~ If there is no prevailing rate of wages set by collective bargaining, the committee shall determine the prevailing rate to be stated in the contract.

(2) Partial payments may be provided for in the contract and paid when certified by the county surveyor and committee."

Section 7. Section 17-8-244, MCA, is amended to read:

"17-8-244. Exemptions. Section 17-8-242 does not apply to the following:

(1) interagency or intergovernmental transactions;

(2) claims subject to a good faith dispute; brought before a government agency or before a court. Interest in a proceeding subject to this subsection is governed by 18-1-404.

(3) delinquencies ~~due to~~ because of natural disasters, disruptions in postal or delivery service, work stoppage ~~due to~~ because of labor disputes, power failures, or any other cause resulting from circumstances clearly beyond the control of the payer agency;

(4) ~~contracts entered into before October 1, 1983;~~

~~—(5) wages due and payable to state employees or payments from any state retirement system created pursuant to Title 19; or~~

~~(6)~~(5) claims submitted to the state or to its fiscal intermediary by providers of supplies or services under the Montana medicaid or workers' compensation program if reasonable cause for nonpayment exists."

Section 8. Section 18-1-101, MCA, is amended to read:

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"18-1-101. Definitions. (1) Unless the context requires otherwise, in this title, "department" means the department of administration provided for in Title 2, chapter 15, part 10.

(2) Unless the context requires otherwise, in this part, the following definitions apply:

(a) "Goods" means supplies, equipment, materials, commodities, and specially manufactured products.

~~(b) "Montana-made" means manufactured or produced in this state and made with the:~~

~~—(i) use of parts, materials, or supplies of which 50% or more were manufactured or produced in this state; or~~

~~—(ii) employment of persons of whom 50% or more are bona fide residents of Montana as defined in 18-2-401.~~

~~—(c) "Nonresident bidder" means a bidder whose residence is not in this state as determined under 18-1-103.~~

~~(d)~~(c) (i) "Public agency" means a department, commission, council, board, bureau, committee, institution, agency, government corporation, or other entity, instrumentality, or official of the legislative, executive, or judicial branch of this state and its political subdivisions, including the board of regents and the Montana university system.

(ii) Public agency does not include a political subdivision for purposes of 18-1-102(1)(b).

~~(e)~~(d) "Resident bidder" means a bidder whose residence is in this state as determined under 18-1-103.

~~(f)~~(e) "Written" means that whenever written or in-writing determinations or documents are required, the public agency responsible for the procurement may specify an appropriate visual medium, such as by computer transmission or by facsimile machine transmission, in the specifications, contract, or rules of the public agency."

Section 9. Section 18-1-102, MCA, is amended to read:

"18-1-102. State contracts to lowest bidder -- reciprocity. (1) ~~(a) Except as provided in subsection (1)(b), in~~ In order to provide for an orderly administration of the business of

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the state of Montana in awarding public contracts for the purchase of goods and for construction, repair, and public works of all kinds, a public agency shall award:

(i)(a) a public contract for construction, repair, or public works to the lowest responsible bidder without regard to residency. However, a resident bidder must be allowed a preference on a contract against the bid of ~~any~~ a nonresident bidder from any state or country that enforces a preference for resident bidders. The preference given to resident bidders of this state must be equal to the preference given in the other state or country.

~~(ii)(b) a public contract for the purchase of goods, if the goods are comparable in quality and performance, to the lowest responsible resident bidder whose:~~

~~—(A) bid is not more than 3% higher than that of the lowest responsible nonresident bidder;~~

~~—(B) offered goods are Montana-made and whose bid is not more than 5% higher than that of the lowest responsible nonresident bidder; or~~

~~—(C) offered goods are Montana-made and whose bid is not more than 3% higher than that of the lowest responsible resident bidder whose offered goods are not Montana-made.~~

~~—(b) The transportation commission or the department of transportation may not enter into a contract for a state-funded highway project or a construction project with a bidder whose operations are not headquartered in the United States unless:~~

~~—(i) the foreign country in which the bidder is headquartered affords companies based in the United States open, fair, and nondiscriminatory access to bidding on highway projects and construction projects located in the foreign country; and~~

~~—(ii) the department of transportation has entered into a reciprocity agreement with the foreign country that addresses:~~

~~—(A) the equal and fair treatment of bids originating in the United States and in the foreign country;~~

~~—(B) specific ownership requirements and tax policies in the United States and in the foreign country that may result in the unequal treatment of all bids received, regardless of their origin;~~

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~~—(C) the means by which contractors from both the United States and the foreign country are notified of highway projects and construction projects available for bid; and~~

~~—(D) any other differences in public policy or procedure that may result in the unequal treatment of bids originating in the United States or in the foreign country for projects located in either the United States or the foreign country.~~

~~—(c) (i) If both subsections (1)(a)(ii)(B) and (1)(a)(ii)(C) are applicable to bids for a contract, the contract must be awarded to the resident bidder whose offered goods are Montana-made if the bid is:~~

~~—(A) not more than 3% higher than that of a resident bidder whose offered goods are not Montana-made; and~~

~~—(B) not more than 5% higher than that of the nonresident bidder.~~

~~—(ii) However, a combination of preferences under this subsection (1)(c) may not exceed 5% without regard to residency. However, a resident must be allowed a preference on a contract against the bid of a nonresident if the state or country of the nonresident enforces a preference for residents. The preference must be equal to the preference given in the other state or country.~~

(2) The preferences in this section apply:

(a) whether the law requires advertisement for bids or does not require advertisement for bids; and

(b) to contracts involving funds obtained from the federal government unless expressly prohibited by the laws of the United States or regulations adopted pursuant to federal laws."

Section 10. Section 18-1-103, MCA, is amended to read:

"18-1-103. Resident defined. (1) For the purpose of 18-1-102, ~~18-1-111~~, and this section, the word "resident" includes actual residence of an individual within this state for a period of more than 1 year immediately prior to bidding.

(2) In a partnership enterprise, limited liability company, or an association, the majority of all partners or ~~association~~ members must have been actual residents of the state of Montana for more than 1 year immediately prior to bidding.

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(3) Domestic corporations organized under the laws of the state of Montana are prima facie eligible to bid as residents, but this qualification may be set aside and a successful bid disallowed when it is shown to the satisfaction of the board, commission, officer, or individual charged with the responsibility for the execution of the contract that the corporation is a wholly owned subsidiary of a foreign corporation or that the corporation was formed for the purpose of circumventing the provisions relating to residence.

~~(4) Notwithstanding the foregoing, any bidder on a contract for the purchase of goods, whether an individual, partnership, or corporation, foreign or domestic and regardless of ownership thereof, whose offered goods are Montana-made is a resident for the purpose of 18-1-102, 18-1-111, and this section."~~

Section 11. Section 18-1-111, MCA, is amended to read:

"18-1-111. Impartiality to be shown in letting contracts -- ~~preference to residents.~~
The department may not show any partiality or favoritism not provided for by law in making awards or contracts ~~and shall be absolutely fair and impartial. Where both the bids and quality of goods offered are the same, preference shall be given to articles of local and domestic production and manufacture, and where both the bids and the quality of goods offered are the same, preference shall be given to resident bidders as defined in 18-1-103 over nonresident bidders."~~

Section 12. Section 18-1-404, MCA, is amended to read:

"18-1-404. Liability of state -- ~~interest~~ -- costs. (1) (a) The state of Montana is liable in respect to any contract entered into in the same manner and to the same extent as a private individual under like circumstances, except the state of Montana is not liable for punitive damages.

(b) The state of Montana is liable for interest from the date on which the payment on the contract became due. This liability is retroactive, within the meaning of 1-2-109, and applies to any contract in effect or an action pending on a contract on or after May 1, 1997. ~~For purposes of this section~~ If the contract is subject to a good faith dispute brought before a government agency or before a court, the interest rate is 10% simple

APPENDIX C -- PROPOSED LEGISLATION

interest each year, whether due before or after a judgment decision by the government agency or court. If the contract does not specify when interest is payable before a judgment decision, interest must be paid at the time provided in 17-8-242(2). If the contract is not subject to a good faith dispute brought before a government agency or before a court, the interest rate is governed by 17-8-242.

(2) Costs may be allowed as provided in 25-10-711. In all other cases, costs must be allowed in all courts to the successful claimant to the same extent as if the state of Montana were a private litigant. The costs must include attorney fees. The liability for attorney fees is retroactive, within the meaning of 1-2-109, and applies to any contract in effect or an action pending on a contract on or after May 1, 1997.

(3) This section does not apply to a contract governed by Title 19."

Section 13. Section 18-2-306, MCA, is amended to read:

"18-2-306. Time of final acceptance and final payment on construction contracts -- interest. (1) A government entity that enters into a contract for the construction of a building shall, unless otherwise provided by law or the contract and within 10 days after a request by the construction contractor for final acceptance, decide whether or not to make final acceptance. Within 30 days after final acceptance by the government entity, the government entity shall make the final payment of the contract price specified in the contract to the other party to the contract.

(2) Except as provided by law or the contract, a government entity that fails to complete the payment of the contract price at the time required by subsection (1) shall pay to the other party to the contract interest at the rate specified in 17-8-242 or 18-1-404, as applicable. Collection of interest pursuant to this section does not preclude any other legal remedy.

(3) The following definitions apply to this section:

(a) "Building" has the meaning provided in 18-2-101.

(b) "Construction" has the meaning provided in 18-2-101.

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(c) "Final acceptance" means the government entity's acceptance of the construction of a building by the contractor upon certification by the architect, project engineer, or other representative of the government entity of final completion of the building.

(d) "Final completion" means that the building has been completed in accordance with the terms and conditions of the contract documents.

(e) "Government entity" means a department, agency, commission, board, authority, institution, or office of the state, including the board of regents and the Montana university system, a municipality, county, consolidated municipal-county government, school district, or other special district."

Section 14. Section 18-4-123, MCA, is amended to read:

"18-4-123. Definitions. In this chapter, unless the context clearly requires otherwise or a different meaning is prescribed for a particular section, the following definitions apply:

(1) "Business" means a corporation, partnership, individual, sole proprietorship, joint-stock company, joint venture, or other private legal entity.

(2) "Change order" means a written order, signed by an authorized department representative, directing the contractor to make changes ~~which~~ that the changes clause of the contract authorizes the department to order without the consent of the contractor.

(3) "Contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies or services.

(4) "Contract modification" means a written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished by mutual action of the parties to the contract.

(5) "Contractor" means a person having a contract with a governmental body.

(6) "Data" means recorded information, regardless of form or characteristic.

(7) "Department" means the department of administration.

(8) "Designee" means an authorized representative of a person holding a superior position.

(9) "Director" means the director of the department of administration.

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(10) "Employee" means an individual drawing a salary from a governmental body, whether elected or not, and any noncompensated individual performing personal services for a governmental body.

(11) "Governmental body" means a department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other entity, instrumentality, or official of the executive, legislative, or judicial branch of this state, including the board of regents and the Montana university system.

(12) (a) "Grant" means the furnishing by the federal government of assistance, whether financial or otherwise, to a person or agency to support a program authorized by law.

(b) ~~It~~ Grant does not include an award whose primary purpose is to procure an end product, whether in the form of supplies or services. A contract resulting from an award is not a grant but a procurement contract.

(13) "Person" means any business, individual, union, committee, club, other organization, or group of individuals.

(14) (a) "Printing" means the reproduction of an image from a printing surface generally made by a contact impression that causes a transfer of ink or the reproduction of an impression by a photographic process and includes graphic arts, typesetting, binding, and other operations necessary to produce a finished printed product.

(b) Printing does not include rebinding or repair by a library or an office, department, board, or commission of books, journals, pamphlets, magazines, and literary articles held as a part of its library collection.

(15) (a) "Procurement" means acquisition with or without cost, buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services. ~~It also~~ The term includes all functions that pertain to the obtaining of any supply or service, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

(b) Procurement does not include the acquiring of supplies or services by gift.

(16) "Procurement officer" means any person authorized to enter into and administer contracts and make written determinations with respect to contracts. The term ~~also~~

APPENDIX C -- PROPOSED LEGISLATION

includes an authorized representative acting within the limits of the representative's authority.

(17) "Purchasing agency" means any governmental body, other than the department, that is authorized by this chapter or its implementing rules or by way of delegation from the director to enter into contracts.

(18) (a) "Services" means the furnishing of labor, time, or effort by a contractor.

(b) ~~The term~~ Services does not include employment agreements or collective bargaining agreements, the provision of human services administered by the department of public health and human services, or services related to construction contracts.

(19) "Supplies" means all property except as otherwise provided by law, including but not limited to equipment, materials, printing, and commodities, and excluding land or any interest in land.

(20) "Using agency" means any governmental body of the state that uses any supplies or services procured under this chapter.

(21) "Vendor" means a person who offers or may offer supplies or services to a public agency."

Section 15. Section 18-4-132, MCA, is amended to read:

"18-4-132. Application. (1) This chapter applies to the expenditure of public funds irrespective of their source, including federal assistance money, by this state acting through a governmental body, ~~as defined in 18-4-123,~~ under any contract, except a contract exempted from this chapter by this section or by a statute that provides that this chapter does not apply to the contract. This chapter applies to a procurement of supplies or services that is at no cost to the state and from which income may be derived by the vendor and to a procurement of supplies or services from which income or a more advantageous business position may be derived by the state. This chapter does not apply to either grants or contracts between the state and its political subdivisions or other governments, except as provided in part 4. This chapter also applies to the disposal of state supplies. This chapter or rules adopted pursuant to this chapter do not prevent any

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governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

(2) This chapter does not apply to construction contracts.

(3) This chapter does not apply to expenditures of or the authorized sale or disposal of equipment purchased with money raised by student activity fees designated for use by the student associations of the university system.

(4) This chapter does not apply to contracts entered into by the Montana state lottery that have an aggregate value of less than \$250,000.

(5) This chapter does not apply to contracts entered into by the state compensation insurance fund to procure insurance-related services.

(6) This chapter does not apply to employment of:

(a) a registered professional engineer, surveyor, real estate appraiser, or registered architect;

(b) a physician, dentist, pharmacist, or other medical, dental, or health care provider;

(c) an expert witness hired for use in litigation, a hearings officer hired in rulemaking and contested case proceedings under the Montana Administrative Procedure Act, or an attorney as specified by executive order of the governor;

(d) consulting actuaries;

(e) a private consultant employed by the student associations of the university system with money raised from student activity fees designated for use by those student associations;

(f) a private consultant employed by the Montana state lottery;

(g) a private investigator licensed by any jurisdiction; or

(h) a claims adjuster.

(7) (a) This chapter does not apply to electric energy purchase contracts by the university of Montana or Montana state university, as defined in 20-25-201.

(b) Any savings accrued by the university of Montana or Montana state university in the purchase or acquisition of energy must be retained by the board of regents of higher education for university allocation and expenditure."

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Section 16. Section 18-4-133, MCA, is amended to read:

"18-4-133. Purchases exempt from general requirements. (1) When immediate delivery of articles or performance of service is required by the public exigencies, the articles or service required may be procured by open purchase or contract at the place and in the manner in which the articles are usually bought and sold or the services engaged between individuals but under the direction of the department.

(2) (a) The department may exempt the department of corrections and the department of public health and human services from the provisions of this chapter for the purchase of suitable clothing by the department of corrections and the department of public health and human services for residents of its institutions and community-based programs.

~~(3)~~(b) As used in this section, "suitable clothing" means styled, seasonable clothing, which will allow the resident to make a normal appearance in the community.

(3) When none of the bids or proposals received in response to a valid solicitation are from a responsible bidder or offeror or responsive bidder or offeror, as defined in 18-4-301, the procurement officer may:

(a) cancel and reissue the solicitation. If the procurement officer reissues the solicitation, the procurement officer shall attempt to increase the number of potential vendors and may modify any specification in the original solicitation.

(b) directly negotiate with a vendor if the procurement officer determines that a second or subsequent solicitation would also be unsuccessful.

(4) The department shall adopt rules describing the conditions under which a procurement officer may negotiate directly with a vendor. The rules must reflect the purposes described in 18-4-122.

(5) When a state department, agency, or official administers a grant of public funds and contracts with a landowner to carry out a recreational or environmental remediation, reclamation, or conservation project that benefits the state, the department may exempt the landowner from the provisions of chapter 1 and this chapter if the landowner conducts the work or conducts a form of competitive procurement allowed by the terms of the contract."

APPENDIX C -- PROPOSED LEGISLATION

Section 17. Section 18-4-141, MCA, is amended to read:

"18-4-141. Contract transfers and collusion prohibited -- violations and penalty. (1)

A contract or order or any interest in a contract or order may not be transferred, assigned, or subcontracted by the party to whom the contract or order is given to any other party without the express written approval of the state, and the state may declare void any unapproved transfer, assignment, or subcontract.

(2) Collusion or secret agreements between ~~bidders~~ vendors for the purpose of securing any advantage to the ~~bidders~~ vendors as against the state in the awarding of contracts ~~is~~ are prohibited. The state may declare the contract void if the department finds sufficient evidence after a contract has been let that the contract was obtained by a ~~bidding~~ vendor or ~~bidders~~ vendors by reason of collusive or secret agreement among the ~~bidders~~ vendors to the disadvantage of the state.

(3) All rights of action for a breach of a contract by the contracting parties are reserved to the state.

(4) A person who violates the provisions of 2-2-201 or this section, or both, is guilty of a misdemeanor and shall be fined an amount of not less than \$500 or more than \$5,000, and the state of Montana may at its option declare any contract in violation of the provisions of 2-2-201 or this section, or both, void ab initio."

Section 18. Section 18-4-301, MCA, is amended to read:

"18-4-301. Definitions. As used in this part, the following definitions apply:

(1) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs ~~which~~ that are allowable and allocable in accordance with the contract terms and the provisions of this chapter; and a fee, if any.

(2) (a) "Displacement" means the layoff, demotion, or involuntary transfer of a state employee.

(b) ~~The term~~ Displacement does not include changes in shift or days off or reassignment to other positions within the same class and at the same general location.

(3) "Established catalog price" means the price included in a catalog, price list, schedule, or other form that:

APPENDIX C -- PROPOSED LEGISLATION

(a) is regularly maintained by a manufacturer or contractor;

(b) is either published or otherwise available for inspection by customers; and

(c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

(4) "Invitation for bids" means all documents, whether attached or incorporated by reference, ~~utilized~~ used for soliciting bids.

(5) "Office supply" means an item included under the office supply commodity class codes maintained by the department.

(6) "Purchase description" means the words used in a solicitation to describe the supplies or services to be purchased and includes specifications attached to or made a part of the solicitation.

(7) "Request for proposals" means all documents, whether attached or incorporated by reference, ~~utilized~~ used for soliciting proposals.

(8) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability ~~which~~ that will assure ensure good faith performance.

(9) "Responsive bidder or offeror" means a person who has submitted a bid ~~which or~~ proposal that conforms in all material respects to the invitation for bids or request for proposals.

(10) "Term contract" means a contract in which supplies or services are purchased at a predetermined unit price for a specific period of time."

Section 19. Section 18-4-301, MCA, is amended to read:

"18-4-301. Definitions. As used in this part, the following definitions apply:

(1) "Alternative procurement method" means a method of procuring supplies or services in a manner not specifically described in this chapter, but instead authorized by the department under 18-4-302.

APPENDIX C -- PROPOSED LEGISLATION

~~(1)~~(2) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs ~~which~~ that are allowable and allocable in accordance with the contract terms and the provisions of this chapter, and a fee, if any.

~~(2)~~(3) (a) "Displacement" means the layoff, demotion, or involuntary transfer of a state employee.

(b) ~~The term~~ Displacement does not include changes in shift or days off or reassignment to other positions within the same class and at the same general location.

~~(3)~~(4) "Established catalog price" means the price included in a catalog, price list, schedule, or other form that:

(a) is regularly maintained by a manufacturer or contractor;

(b) is either published or otherwise available for inspection by customers; and

(c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

~~(4)~~(5) "Invitation for bids" means all documents, whether attached or incorporated by reference, ~~utilized~~ used for soliciting bids.

~~(5)~~(6) "Office supply" means an item included under the office supply commodity class codes maintained by the department.

~~(6)~~(7) "Purchase description" means the words used in a solicitation to describe the supplies or services to be purchased and includes specifications attached to or made a part of the solicitation.

~~(7)~~(8) "Request for proposals" means all documents, whether attached or incorporated by reference, ~~utilized~~ used for soliciting proposals.

~~(8)~~(9) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability ~~which~~ that will ~~assure~~ ensure good faith performance.

~~(9)~~(10) "Responsive bidder" means a person who has submitted a bid ~~which~~ that conforms in all material respects to the invitation for bids.

~~(10)~~(11) "Term contract" means a contract in which supplies or services are purchased at a predetermined unit price for a specific period of time."

APPENDIX C -- PROPOSED LEGISLATION

Section 20. Section 18-4-302, MCA, is amended to read:

"18-4-302. Methods of source selection -- authorization for alternative procurement methods. (1) Unless otherwise authorized by law, all state contracts for supplies and services must be awarded by a source selection method provided for in this title. Supplies or services offered for sale, lease, or rental by public utilities are exempt from this requirement if the prices of the supplies or services are regulated by the public service commission or other governmental authority.

(2) ~~At the time that~~ When the department or another agency opens bids or proposals, if a supplier's current publicly advertised or established catalog price is received at or before the time that the bids or proposals are opened and is less than the bid of the lowest responsible and responsive bidder or offeror or improves upon the conditions for the best proposal received using the same factors and weights included in the proposal, the department or agency may reject all bids and purchase the supply from that supplier without meeting the requirements of 18-4-303 through 18-4-306.

(3) An office supply procured by the department's central stores program may be purchased by an agency, without meeting the requirements of 18-4-303 through 18-4-306, from a supplier whose publicly advertised price, established catalog price, or discount price offered to the agency is less than the price offered by the central stores program if the office supply conforms in all material respects to the terms, conditions, and quality offered by the central stores program. A state office supply term contract must include a provision by which the contracting parties acknowledge and agree to the provisions of this subsection.

(4) (a) Under rules adopted by the department, an agency may request from the department authorization for an alternative procurement method.

(b) A request for authorization must specify:

(i) the problem to be solved;

(ii) the proposed alternative procurement method;

(iii) the reasons why the alternative procurement method may be more appropriate than a method authorized by law; and

APPENDIX C -- PROPOSED LEGISLATION

(iv) how competition and fairness will be achieved by the alternative procurement method.

(c) Within 30 days after receiving the request, the department shall:

(i) evaluate the request;

(ii) approve or deny the request; and

(iii) issue a written statement providing the reasons for its decision.

(d) Whenever the department approves a request submitted under this section, the department:

(i) may authorize the alternative procurement method on a trial basis; and

(ii) if the alternative procurement method is employed, shall make a written determination as to the success of the method.

(e) If the department determines that the alternative procurement method is successful and should be an alternative that is generally available, it shall promulgate rules that establish the use of the alternative procurement method as an additional source selection method. The rules promulgated by the department under this subsection must reflect the purposes described in 18-4-122."

Section 21. Section 18-4-306, MCA, is amended to read:

"18-4-306. Sole source procurement -- records. (1) A contract may be awarded for a supply or service item without competition when, under rules adopted by the department, the director, the head of a purchasing agency, or a designee of either officer above the level of the procurement officer determines in writing that:

(a) there is only one source for the ~~required~~ supply or service item;

(b) only one source is acceptable or suitable for the supply or service item; or

(c) the supply or service item must be compatible with current supplies or services.

(2) The department may require the submission of cost or pricing data in connection with an award under this section.

~~(2)~~(3) The department shall maintain or shall require the head of a purchasing agency to maintain a record listing all contracts made under this section for a minimum of 4 years. The record must contain:

APPENDIX C -- PROPOSED LEGISLATION

- (a) each contractor's name;
 - (b) the amount and type of each contract; and
 - (c) a listing of the supplies or services procured under each contract.
- ~~(3)~~(4) The record must be available for public inspection."

Section 22. Section 18-4-313, MCA, is amended to read:

"18-4-313. Contracts -- terms, extensions, and time limits. (1) Unless otherwise provided by law, a contract, lease, or rental agreement for supplies or services may not be made for a period of more than 7 years. However, the department may contract for the lease or purchase of hardware, software, or services for telecommunications equipment and systems, or data processing equipment, the department of revenue liquor agencies, and the department of public health and human services medicaid management information system (MMIS) for a period not to exceed 10 years. A contract, lease, or rental agreement may be extended or renewed if the terms of the extension or renewal, if any, are included in the solicitation, if funds are available for the first fiscal period at the time of the agreement, and if the total contract period, including any extension or renewal, does not exceed 7 years. Payment and performance obligations for succeeding fiscal periods are subject to the availability and appropriation of funds for the fiscal periods.

(2) Prior to the issuance, extension, or renewal of a contract, it must be determined that:

- (a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and
- (b) the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(3) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled."

Section 23. Section 18-5-308, MCA, is amended to read:

APPENDIX C -- PROPOSED LEGISLATION

"18-5-308. (Temporary) Construction with other sections. Procurement from small businesses under this part is subject to all other statutes governing state procurement and all rules promulgated ~~thereunder, as now or hereafter amended~~ under those statutes, except that in case of conflict, this part governs and the provisions set forth in 18-1-102, ~~18-1-111, and 18-1-112 shall~~ do not apply. (Repealed effective June 30, 2003--secs. 4(2), 5(2), Ch. 271, L. 1999.)"

Section 24. Section 18-7-107, MCA, is amended to read:

"18-7-107. State printing, binding, and stationery work. All printing, binding, and stationery work for the state of Montana ~~must be printed in the state of Montana by the lowest responsible bidder if the bid, including the cost of delivery, does not exceed the lowest bid by a nonresident printer by more than 8%. If there is no responsible in-state bidder, the work may be performed by the lowest responsible bidder outside the state~~ is subject to the preference in 18-1-102(1)(b). Federal exemptions as specified in 18-1-102(2)(b) apply."

Section 25. Section 60-2-112, MCA, is amended to read:

"60-2-112. Competitive bidding -- reciprocity. (1) Except as provided in subsections (2) through (5), ~~when~~ if the estimated cost of any work exceeds \$50,000, the commission shall ~~let~~ award the contract by competitive bidding to the lowest responsible and responsive bidder. ~~Award~~ The award must be made upon the notice and terms that the commission prescribes by its rules. However, except when prohibited by federal law, the commission shall make awards and contracts in accordance with 18-1-102 ~~and 18-1-112.~~

(2) The commission may ~~let~~ award a contract by means other than competitive bidding if it determines that special circumstances so require. The commission shall specify the special circumstances in writing.

(3) The commission may enter into contracts with units of local government for the construction of projects without competitive bidding if it finds that the work can be accomplished at lower total costs, including total costs of labor, materials, supplies,

APPENDIX C -- PROPOSED LEGISLATION

equipment usage, engineering, supervision, clerical and accounting services, administrative costs, and reasonable estimates of other costs attributable to the project.

(4) The commission may delegate to the department the authority to enter, without competitive bidding, agreed-upon price contracts for projects costing \$50,000 or less.

(5) The commission or the department may not enter into a contract for a state-funded highway project or a construction project with a bidder whose operations are not headquartered in the United States unless:

(a) the foreign country in which the bidder is headquartered affords companies based in the United States open, fair, and nondiscriminatory access to bidding on highway projects and construction projects located in the foreign country; and

(b) the department has entered into a reciprocity agreement with the foreign country that addresses:

(i) the equal and fair treatment of bids originating in the United States and in the foreign country;

(ii) specific ownership requirements and tax policies in the United States and in the foreign country that may result in the unequal treatment of all bids received, regardless of their origin;

(iii) the means by which contractors from both the United States and the foreign country are notified of highway projects and construction projects available for bid; and

(iv) any other differences in public policy or procedure that may result in the unequal treatment of bids originating in the United States or in the foreign country for projects located in either the United States or the foreign country.

(6) For the purposes of subsection (5), "construction" has the ~~same~~ meaning ~~as is~~ provided in 18-2-101."

NEW SECTION. **Section 26. Repealer.** Section 18-1-112, MCA, is repealed.

NEW SECTION. **Section 27. Effective dates.** (1) Except as provided in subsection (2), [this act] is effective October 1, 2001.

(2) [Section 18] is effective July 1, 2005.

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NEW SECTION. **Section 28. Applicability.** [This act] applies to contracts for which the contracting government entity begins the contracting process after October 1, 2001.

NEW SECTION. **Section 29. Termination.** [Sections 19 and 20] terminate June 30, 2005.

- END -

APPENDIX C -- PROPOSED LEGISLATION

HOUSE BILL NO. 48

INTRODUCED BY E. CLARK

BY REQUEST OF THE STATE ADMINISTRATION, PUBLIC RETIREMENT SYSTEMS,
AND VETERANS' AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT APPROPRIATING FUNDS TO IMPLEMENT CERTAIN RECOMMENDATIONS OF THE STATE ADMINISTRATION, PUBLIC RETIREMENT SYSTEMS, AND VETERANS' AFFAIRS INTERIM COMMITTEE AS THE RECOMMENDATIONS RELATE TO STATE PROCUREMENT AND CONTRACTING; PROVIDING AN APPROPRIATION; AND PROVIDING AN EFFECTIVE DATE."

WHEREAS, the Legislature finds that it is in the best interests of the state to cultivate relationships with the entities with which the state does business, particularly those businesses commonly recognized as vendors of supplies and services; and

WHEREAS, the Legislature finds that technology provides both opportunities and challenges for state procurement officials and vendors wishing to do business with the state; and

WHEREAS, the nature, scope, value, complexity, and visibility of public procurements and the contracts that enforce them continue to expand; and

WHEREAS, with changes in technology, the state's business environment, and the craft of designing and executing procurements and contracts, there is a high demand and clear need for a well-trained and adequately-staffed workforce; and

WHEREAS, the Legislature finds that an investment in certain initiatives relevant to state procurement and contracts, including vendor outreach, staff training, and adequate workforce, is prudent and necessary for the purposes of advancing the best interests of the state.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

APPENDIX C -- PROPOSED LEGISLATION

NEW SECTION. **Section 1. Appropriation.** (1) There is appropriated from the general fund to the department of administration for fiscal year 2002:

(a) \$57,374, to be used only for a position within the department to perform the following:

(i) develop and provide a vendor outreach program to help businesses do business with the state;

(ii) provide training to procurement staff; and

(iii) develop and implement a certification program for state contracts officers and contracts assistants;

(b) \$15,000, to be used only for certification programs that are intended to serve, in part, as competency indicators for certain decisions regarding hiring or retention as a contracts officer or assistant or as a contracts manager;

(c) \$74,057, to be used only for a contracts officer position and a contracts assistant position to address state procurement workload issues;

(d) \$49,374, to be used only for a contracts manager position;

(e) \$46,500, to be used to deploy a system to:

(i) disseminate notification to vendors of contract opportunities;

(ii) allow for online vendor registration, tracking, and notification; and

(iii) allow for the submission of bids and proposals and for the award and payment of claims over the internet or through other technology that can facilitate electronic commerce; and

(f) \$25,000 for equipment and supplies for the positions described in subsections (1)(a), (1)(c), and (1)(d).

(2) There is appropriated from the general fund to the department of administration for fiscal year 2003:

(a) \$45,874, to be used only for the position described in subsection (1)(a);

(b) \$15,000, for the certification programs described in subsection (1)(b);

(c) \$67,557, to be used only for the positions described in subsection (1)(c);

(d) \$45,874, to be used only for the position described in subsection (1)(d); and

(e) \$1,500, to be used to maintain the system described in subsection (1)(e).

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(3) The appropriations in subsections (1)(a), (1)(c), (1)(d), (2)(a), (2)(c), and (2)(d) may be used for personal services costs and for operating expenses and equipment necessary for the positions described in subsections (1)(a), (1)(c), (1)(d), (2)(a), (2)(c), and (2)(d).

(4) The positions and the training and vendor outreach programs described and funded in this section must be budgeted for and shown as new proposals in the executive budget presented to the 58th legislature.

NEW SECTION. **Section 2. Effective date.** [This act] is effective July 1, 2001.

- END -

APPENDIX D -- GLOSSARY

The definitions provided in this appendix are directly from Title 18 of the Montana Code Annotated. In general, the definitions applicable to contracts between private parties, found generally in Title 28 and Title 30, MCA, and definitions in the Uniform Commercial Code are also relevant.

Other terms commonly used may be found in the most current version of the American Bar Association Model Procurement Act (MPA) which is updated periodically. Other sources of procurement terms include the National Association of State Procurement Officials (NASPO) and the National Contract Management Association (NCMA).

18-1-101. Definitions. (1) Unless the context requires otherwise, in this title "department" means the department of administration provided for in Title 2, chapter 15, part 10.

(2) Unless the context requires otherwise, in this part, the following definitions apply:

(a) "Goods" means supplies, equipment, materials, commodities, and specially manufactured products.

(b) "Montana-made" means manufactured or produced in this state and made with the:

(i) use of parts, materials, or supplies of which 50% or more were manufactured or produced in this state; or

(ii) employment of persons of whom 50% or more are bona fide residents of Montana as defined in 18-2-401.

(c) "Nonresident bidder" means a bidder whose residence is not in this state as determined under 18-1-103.

(d) "Public agency" means a department, commission, council, board, bureau, committee, institution, agency, government corporation, or other entity, instrumentality, or official of the legislative, executive, or judicial branch of this

state and its political subdivisions, including the board of regents and the Montana university system.

(e) "Resident bidder" means a bidder whose residence is in this state as determined under 18-1-103.

(f) "Written" means that whenever written or in-writing determinations or documents are required, the public agency responsible for the procurement may specify an appropriate visual medium, such as by computer transmission or by facsimile machine transmission, in the specifications, contract, or rules of the public agency.

18-2-101. Definitions of building, costs, and construction. In part 1 of this chapter, with the exception of 18-2-104, 18-2-107, 18-2-113, 18-2-114, 18-2-122, and 18-2-123:

(1) "building" includes a building, facility, or structure:

- (a) constructed or purchased wholly or in part with state money;
- (b) at a state institution;

(c) owned or to be owned by a state agency, including the department of transportation;

(d) constructed for the use or benefit of the state with federal or private money as provided in 18-2-102(2)(d);

(2) "building" does not include a building, facility, or structure:

(a) owned or to be owned by a county, city, town, school district, or special improvement district;

(b) used as a component part of an environmental remediation or abandoned mine land reclamation project, a highway, or a water conservation project, unless the building will require a continuing state general fund financial obligation after the environmental remediation or abandoned mine land reclamation project is completed;

(c) leased or to be leased by a state agency;

APPENDIX D -- GLOSSARY

(3) "construction" includes the construction, alteration, repair, maintenance, and remodeling of a building and the equipping and furnishing of a building during construction, alteration, repair, maintenance, and remodeling;

(4) "costs" means those expenses defined in 17-5-401 and 17-5-801.

18-2-401. Definitions. Unless the context requires otherwise, in this part, the following definitions apply:

(1) A "bona fide resident of Montana" is a person who, at the time of employment and immediately prior to the time of employment, has lived in this state in a manner and for a time that is sufficient to clearly justify the conclusion that the person's past habitation in this state has been coupled with an intention to make it the person's home. Sojourners or persons who come to Montana solely in pursuance of any contract or agreement to perform labor may not be considered to be bona fide residents of Montana within the meaning and for the purpose of this part.

(2) "Commissioner" means the commissioner of labor and industry provided for in 2-15-1701.

(3) (a) "Construction services" means work performed by an individual in construction, heavy construction, highway construction, and remodeling work.

(b) The term does not include:

(i) engineering, superintendence, management, office, or clerical work on a public works contract; or

(ii) consulting contracts, contracts with commercial suppliers for goods and supplies, or contracts with professionals licensed under state law.

(4) "Department" means the department of labor and industry provided for in 2-15-1701.

(5) "District" means a prevailing wage rate district established as provided in 18-2-411.

(6) "Heavy and highway construction wage rates" means wage rates, including fringe benefits for health and welfare and pension contributions, that

meet the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor and zone pay and travel allowance that are determined and established statewide for heavy and highway construction projects, such as alteration or repair of roads, streets, highways, alleys, runways, trails, parking areas, utility rights-of-way, staging yards located on or off the right-of-way, or new or reopened pits that produce aggregate, asphalt, concrete, or backfill when the pit does not normally sell to the general public.

(7) "Nonconstruction services" means work performed by an individual, not including management, office, or clerical work, for:

(a) the maintenance of publicly owned buildings and facilities, including public highways, roads, streets, and alleys;

(b) custodial or security services for publicly owned buildings and facilities;

(c) grounds maintenance for publicly owned property;

(d) the operation of public drinking water supply, waste collection, and waste disposal systems;

(e) law enforcement, including janitors and prison guards;

(f) fire protection;

(g) public or school transportation driving;

(h) nursing, nurse's aid services, and medical laboratory technician services;

(i) material and mail handling;

(j) food service and cooking;

(k) motor vehicle and construction equipment repair and servicing; and

(l) appliance and office machine repair and servicing.

(8) "Project location" means the construction site where a public works project involving construction services is being built, installed, or otherwise improved or reclaimed, as specified on the project plans and specifications.

(9) (a) "Public works contract" means a contract for construction services let by the state, county, municipality, school district, or political subdivision or for nonconstruction services let by the state, county, municipality, or political

subdivision in which the total cost of the contract is in excess of \$25,000. The nonconstruction services classification does not apply to any school district that at any time prior to April 27, 1999, contracted with a private contractor for the provision of nonconstruction services on behalf of the district.

(b) The term does not include contracts entered into by the department of public health and human services for the provision of human services.

(10) "Special circumstances" means all work performed at a facility that is built or developed for a specific Montana public works project and that is located in a prevailing wage district that contains the project location or that is located in a contiguous prevailing wage district.

(11) (a) "Standard prevailing rate of wages" or "standard prevailing wage" means:

(i) the heavy and highway construction wage rates applicable to heavy and highway construction projects; or

(ii) those wages, other than heavy and highway construction wages, including fringe benefits for health and welfare and pension contributions, that meet the requirements of the Employee Retirement Security Act of 1974 and other bona fide programs approved by the United States department of labor and travel allowance that are paid in the district by other contractors for work of a similar character performed in that district by each craft, classification, or type of worker needed to complete a contract under this part. In each district, the standard prevailing rate of wages must be computed from a weighted average wage rate based on all of the hours worked on work of a similar character performed in the district unless the survey of employers in the district does not generate sufficient data. If the survey produces insufficient data, the rate may be established by the use of other information or methods that the commissioner determines fairly establish the standard prevailing rate of wages. The commissioner shall establish by rule the method or methods by which the standard prevailing rate of wages is determined. The rules must establish a process for determining if there is insufficient data generated by a survey of employers in the district that requires the

use of other methods of determining the standard prevailing rate of wages. The rules must identify the amount of data that constitutes insufficient data and require the commissioner of labor to use other methods of determining the standard prevailing rate of wages when insufficient data exists. The alternative methods of determining the prevailing rate of wages must provide for review and the incorporation of data from work of a similar character that is conducted as near as possible to the original district.

(b) When work of a similar character is not being performed in the district, the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that meets the requirements of the Employee Retirement Security Act of 1974 and other bona fide programs approved by the United States department of labor and the rate of travel allowance must be those rates established by collective bargaining agreements in effect in the district for each craft, classification, or type of worker needed to complete the contract.

(12) "Work of a similar character" means work on private or commercial projects as well as work on public projects.

18-4-123. Definitions. In this chapter, unless the context clearly requires otherwise or a different meaning is prescribed for a particular section, the following definitions apply:

(1) "Business" means a corporation, partnership, individual, sole proprietorship, joint-stock company, joint venture, or other private legal entity.

(2) "Change order" means a written order, signed by an authorized department representative, directing the contractor to make changes which the changes clause of the contract authorizes the department to order without the consent of the contractor.

(3) "Contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies or services.

(4) "Contract modification" means a written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other

APPENDIX D -- GLOSSARY

provisions of a contract accomplished by mutual action of the parties to the contract.

(5) "Contractor" means a person having a contract with a governmental body.

(6) "Data" means recorded information, regardless of form or characteristic.

(7) "Department" means the department of administration.

(8) "Designee" means an authorized representative of a person holding a superior position.

(9) "Director" means the director of the department of administration.

(10) "Employee" means an individual drawing a salary from a governmental body, whether elected or not, and any noncompensated individual performing personal services for a governmental body.

(11) "Governmental body" means a department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other entity, instrumentality, or official of the executive, legislative, or judicial branch of this state, including the board of regents and the Montana university system.

(12) "Grant" means the furnishing by the federal government of assistance, whether financial or otherwise, to a person or agency to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies or services. A contract resulting from an award is not a grant but a procurement contract.

(13) "Person" means any business, individual, union, committee, club, other organization, or group of individuals.

(14) "Printing" means the reproduction of an image from a printing surface generally made by a contact impression that causes a transfer of ink or the reproduction of an impression by a photographic process and includes graphic arts, typesetting, binding, and other operations necessary to produce a finished printed product. Printing does not include rebinding or repair by a library or an office,

department, board, or commission of books, journals, pamphlets, magazines, and literary articles held as a part of its library collection.

(15) "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services. It also includes all functions that pertain to the obtaining of any supply or service, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

(16) "Procurement officer" means any person authorized to enter into and administer contracts and make written determinations with respect to contracts. The term also includes an authorized representative acting within the limits of the representative's authority.

(17) "Purchasing agency" means any governmental body, other than the department, that is authorized by this chapter or its implementing rules or by way of delegation from the director to enter into contracts.

(18) "Services" means the furnishing of labor, time, or effort by a contractor. The term does not include employment agreements or collective bargaining agreements, the provision of human services administered by the department of public health and human services, or services related to construction contracts.

(19) "Supplies" means all property except as otherwise provided by law, including but not limited to equipment, materials, printing, and commodities, and excluding land or any interest in land.

(20) "Using agency" means any governmental body of the state that uses any supplies or services procured under this chapter.

(21) "Vendor" means a person who offers or may offer supplies or services to a public agency.

18-4-231. Definition of specification. As used in 18-4-231 through 18-4-234, "specification" means any description of the physical or functional characteristics or of the nature of a supply or service. It may include a description

of any requirement for inspecting, testing, or preparing a supply or service for delivery.

18-4-301. Definitions. As used in this part, the following definitions apply:

(1) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this chapter, and a fee, if any.

(2) "Displacement" means the layoff, demotion, or involuntary transfer of a state employee. The term does not include changes in shift or days off or reassignment to other positions within the same class and at the same general location.

(3) "Established catalog price" means the price included in a catalog, price list, schedule, or other form that:

(a) is regularly maintained by a manufacturer or contractor;

(b) is either published or otherwise available for inspection by customers; and

(c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

(4) "Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids.

(5) "Office supply" means an item included under the office supply commodity class codes maintained by the department.

(6) "Purchase description" means the words used in a solicitation to describe the supplies or services to be purchased and includes specifications attached to or made a part of the solicitation.

(7) "Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

(8) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance.

(9) "Responsive bidder" means a person who has submitted a bid which conforms in all material respects to the invitation for bids.

(10) "Term contract" means a contract in which supplies or services are purchased at a predetermined unit price for a specific period of time.

18-4-401. Definitions. As used in this part, the following definitions apply:

(1) "Cooperative purchasing" means procurement conducted by or on behalf of more than one public procurement unit.

(2) "Local public procurement unit" means a county, city, town, or other subdivision of the state or a public agency of any such subdivision; public authority; educational, health, or other institution; to the extent provided by law, any other entity that expends public funds for the procurement of supplies and services; and any nonprofit corporation operating a charitable hospital.

(3) "Public procurement unit" means a local or state public procurement unit of this or any other state, including an agency of the United States, or a tribal procurement unit.

(4) "State public procurement unit" means a state department, agency, or official that expends public funds for the procurement of supplies and services.

(5) "Tribal procurement unit" means a tribal government, tribal entity, or official of a tribal government located in Montana that expends tribal funds or funds administered by a tribe for the procurement of supplies and services to the extent provided by tribal or federal law."

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